TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 111

DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA, PETITIONER,

vs.

EVELYN KIRCHNER, ADMINISTRATRIX OF THE ESTATE OF ELLINOR GREEN VANCE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED MAY 21, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

SUPREME COURT OF THE UNITED STATES

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[fol. a] [File endorsement omitted]

[fol. 1]

IN THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

Department No. 5

No. 510,122

Honorable Byron Arnold, Judge.

Department of Mental Hygiene of the State of California, Plaintiff,

vs.

Evelyn Kirchner, Administratrix of the Estate of Ellinor Green Vance, Defendant.

Clerk's Transcript

Appearances:

For the Plaintiff: Stanley Mosk, Attorney General of the State of California, by Elizabeth Palmer, Deputy and John C. Porter, Deputy Attorney Gen'l, 600 State Building, San Francisco 2, California.

For the Defendant: Messrs. Dinkelspiel & Dinkelspiel, by Alan Dougherty, Esquire, 234 Marshall Street, Redwood City, California.

[fol. 3]

Complaint for Money—Filed April 19, 1961

Plaintiff above named complains of defendant above named and for cause of action alleges:

I

That heretofore and on or about January 15, 1953, Auguste Schaeche was duly adjudged mentally ill by the

Superior Court of the State of California in and for the County of San Francisco and by the court committed to Agnews State Hospital where she has been a patient since January 15, 1953, and where she now is a patient receiving board, care, maintenance, and medical attention from said institution as a patient thereof.

II

That Ellinor Green Vance, deceased, was the daughter of said Auguste Schaeche and as such was legally responsible for the support, care, maintenance, and medical attention furnished to said Auguste Schaeche at Agnews State Hospital; that said Ellinor Green Vance died on or about August 25, 1960.

III

That pursuant to the provisions of section 6651 of the Welfare and Institutions Code of the State of California the Director of Mental Hygiene determined the rate for the care, support, maintenance and medical attention of said Auguste Schaeche; that said charges were made continu- [fol. 4] ously for every month said incompetent person was a patient at Agnews State Hospital.

IV

That for the period August 25, 1956, through August 24, 1960, there became due and owing to the Department of Mental Hygiene of the State of California for the care, support and maintenance of said incompetent, the sum of Seven Thousand, Five Hundred Fifty-Four and 22/100 ($7,554.22) Dollars; that no part of said sum has been paid; that the entire sum is now due, owing and unpaid.

V

That Letters Testamentary were by order of the Superior Court of the State of California in and for the County of San Francisco in proceeding No. 154752 in the files of

said court issued to Evelyn Kirchner, defendant herein; that the said Evelyn Kirchner was duly qualified as administratrix and entered into the discharge of her duties and ever since her appointment has been and now is the duly qualified and acting administratrix of the Estate of Ellinor Green Vance, Deceased.

VI

That on or about November 3, 1960, plaintiff herein filed a verified Creditor's Claim in the sum of $7,554.22 with said defendant as executor of the estate of said deceased by filing said claim with the clerk of the Superior Court of the State of California in and for the City and County of San Francisco wherein the said estate was and ever [fol. 5] since has been and now is pending within the jurisdiction of said court; that a copy of said claim is attached hereto marked Exhibit "A" and made a part hereof as though fully set forth herein.

VII

That on or about January 25, 1961, said claim was rejected by said administratrix, Evelyn Kirchner.

VIII

That there is now due, owing and unpaid from defendant herein as executor of said estate to the plaintiff herein, the total sum of Seven Thousand, Five Hundred Fifty-Four and 22/100 ($7,554.22) Dollars, no part of which has been paid; that said defendant has failed and refused to pay the sum or any part thereof.

Wherefore, plaintiff prays judgment against said defendant Evelyn Kirchner, as administratrix of the Estate of Ellinor Green Vance, deceased, and against said estate for the sum of Seven Thousand, Five Hundred Fifty-four and 22/100 ($7,554.22) Dollars, for board costs and medical attention furnished to Auguste Schaeche at Agnews State Hospital for the period of August 25, 1956, through August 24, 1960, to be paid out of the funds of the estate in due course of administration of said estate together with legal

interest thereon from the date hereof; for plaintiff's costs of suit and for such other and further relief as to the court may seem just and proper.

Stanley Mosk, Attorney General of the State of Cali-
[fol. 6] fornia; Elizabeth Palmer, Deputy, John C. Porter, Deputy, Attorneys for Plaintiff.

[File endorsement omitted]

(Exhibit "A" Attached)

[fol. 7]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

DEMURRER TO COMPLAINT—Filed May 24, 1961

Now comes the defendant, Evelyn Kirchner, Administratrix of the estate of Ellinor Green Vance, and demurs to the complaint in the above entitled action as follows:

I.

That the same does not state facts sufficient to constitute a cause of action in that said complaint fails to allege that said incompetent has no estate out of which the claim of plaintiff can be satisfied.

Wherefore, defendant prays that plaintiff take nothing by its said action, but that the same be dismissed, and that the defendant have judgment against plaintiff for defendant's costs incurred herein.

Dated: May 23, 1961.

Dinkelspiel & Dinkelspiel, By: Dougherty, Alan A.,
Attorneys for Defendant.

I, Alan A. Dougherty, one of the attorneys for the above named defendant, do hereby certify that the above demurrer to plaintiff's complaint is not interposed for the purpose of delay and that in my opinion the issues therein raised are well taken in law.

Alan A. Dougherty.

[fol. 8]

Memorandum of Points and Authorities

Welf. & Inst. C. 6650 provides in part as follows:

"• • • The husband, wife, father, mother, or children of a mentally ill person or inebriate, and the administrators of their estates, and the estates of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability, and such liability shall exist whether the mentally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of sections • • •"

Apparently, plaintiff relies on this section as the basis of its claim set forth in the complaint on file herein.

Welf. & Inst. C. 6650 was interpreted by the court in the Guardianship of Thrasher (1951) 105 C.A. 2d 768 in which the court held that a husband was liable to the Department of Mental Hygiene under similar circumstances even though the wife had a separate estate or other means out of which the claim of the State Department could have been paid. The court followed the reasoning set forth in the case of Meyer's Estate, Myrick, Probate Court Report 178 where the court says:

"It is the duty of the husband to maintain the wife, [fol. 9] whether she be sane or insane; and while he has the ability so to do, resort cannot be had to her estate."

In the Thrasher case the court looked to all statutory provisions covering the relationship of husband to wife and his liability therefor and found that there is a primary liability on the part of a husband to support the wife and that the obligation does not cease when the wife is adjudged insane.

In the case before this court the defendant is the estate of a deceased adult daughter; there never was any primary responsibility on the part of the adult daughter to support the mother. To the contrary, there never was a duty of any kind on the deceased daughter to support the mother. C.C. 206 reads in part as follows:

> "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability • • •."

Therefore, Welf. & Inst. C. 6650 must be read together with C.C. 206.

Further, Welf. & Inst. C. 6650 must be read together with Welf. & Inst. Co. 6655 which reads in part as follows:

> "If any person committed to a state mental hospital has sufficient estate for the purpose, the guardian of his estate shall pay for his care, support, maintenance and necessary expenses at the mental hospital to the [fol. 10] extent of the estate."

Dinkelspiel & Dinkelspiel, By: Alan A. Dougherty,
Attorneys for Defendant.

(Proof of Service by Mail Attached)

[File endorsement omitted]

[fol. 11]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

MINUTE ORDER—June 1, 1961

No. 510,122

Department No. 13

Vol. 652, Page 66

Dem. sub.

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

MINUTE ORDER—June 7, 1961

No. 510,122

Vol. 652, Page 71

Dem. overruled—10 days to answer.

[fol. 12]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF OVERRULING DEMURRER—Filed June 13, 1961

To the Above Named Defendant and to Her Attorney, Alan Dougherty:

You and Each of You Will Please Take Notice that the demurrer interposed by the defendant to the complaint on file herein has been overruled and defendant is given ten days in which to answer the complaint herein.

Dated: June 12, 1961.

Stanley Mosk, Attorney General of the State of California; Elizabeth Palmer, Deputy Attorney General; John Carl Porter, Deputy Attorney General, Attorneys for plaintiff.

Affidavit of Service by Mail (omitted in printing).

[fol. 13] [File endorsement omitted]

[fol. 14]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

ANSWER TO COMPLAINT—Filed June 22, 1961

Comes now the defendant and in answer to the complaint on file herein alleges:

I.

Answering Paragraph II of said complaint defendant denies that Ellinor Green Vance, deceased, was legally responsible for the support, care, maintenance, and medical attention furnished to said Auguste Schaeche at Agnew State Hospital or any other place whatsoever.

II.

Answering Paragraph VIII of said complaint defendant denies each and every allegation therein contained and denies that she is indebted to the plaintiff in the amount of Seven Thousand Five Hundred Fifty-Four Dollars Twenty-Two Cents ($7,554.22) or in any other sum whatsoever.

Wherefore, etc.

As and for a Further, Separate and Distinct Defense to the complaint on file herein defendant alleges as follows:

I.

That on or about the 15th day of January, 1953 said Auguste Schaeche was duly adjudged incompetent by the Superior Court of the State of California in and for the City and County of San Francisco and ordered committed to the state asylum for insane at Agnew, California, where she now is.

[fol. 15]

II.

That on the 9th day of October, 1956 on the petition of Ellinor Vance, the adult daughter of said incompetent, said Ellinor Vance was appointed the guardian of the estate of said August Schaeche, an incompetent, by the

Superior Court of the State of California, in and for the City and County of San Francisco, being matter number 139898 therein, and on the same day said Ellinor Vance qualified as guardian and letters of guardianship were thereupon issued to her.

III.

That thereafter and on the 23rd day of October, 1956 on petition of Department of Mental Hygiene of the State of California for an order directing payment by the guardian for the care, support, and maintenance of said Auguste Schaeche, the court made its order giving the Department of Mental Hygiene an equitable lien on the estate of said incompetent for the sum of Six Thousand Four Hundred Twenty-Five Dollars ($6,425.00) for accrued charges for the care, maintenance and medical attention of said incompetent for the period ending September 30, 1958, and for such other sums as may become due the Department of Mental Hygiene for further support of said incompetent; that attached hereto and by this reference made a part hereof is a true and correct copy of said order.

IV.

That on or about the 25th day of August, 1961, said Ellinor Vance died, and thereafter, and on the 16th day [fol. 16] of January, 1961, upon the petition of Evelyn Kirchner, said Evelyn Kirchner was appointed the guardian of the estate of said incompetent, Auguste Schaeche. That thereafter said Evelyn Kirchner, as the guardian of the estate of said incompetent, caused the real property in said guardianship to be sold for the net amount of Ten Thousand Nine Hundred Three Dollars Thirty-Five Cents ($10,903.35) which said balance is now being held on deposit by Bay Counties Title Guarantee Company of San Francisco, California. That on the 7th day of April, 1961, said Evelyn Kirchner requested of plaintiff, as guardian of the estate of said incompetent an itemized statement setting forth the amounts due plaintiff on account of care, maintenance and medical expenses incurred on account of said incompetent so that the same could be presented to

the court and paid, but the plaintiff herein refused and continues to refuse to render said statement.

V.

That because of plaintiff's refusal to make arrangements for the payment of its claim from the estate of the guardianship of said incompetent, plaintiff should be estopped from asserting its claim against this defendant.

Wherefore, etc.

As and for a Second Further, Separate and Distinct Defense to the complaint on file herein defendant alleges as follows:

I.

That by reason of the order of October 23, 1958 and attached hereto the rights of plaintiff have been fully adjudi- [fol. 17] cated and determined, and the plaintiffs now have a lien for the amount sued for herein on the assets on deposit in the guardianship proceeding heretofore referred to.

Wherefore, defendant prays that plaintiff take nothing by its complaint and defendant be hence dismissed with its costs.

Dinkelspiel & Dinkelspiel, By: Alan A. Dougherty, Attorneys for Defendant.

[File endorsement omitted]

Duly sworn to by Evelyn Kirchner, jurat omitted in printing.

[fol. 18]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS—Filed November 7, 1961

I

This is an action brought by plaintiff, Department of Mental Hygiene of the State of California, against the estate of a deceased daughter for the support of her incompetent mother who is presently confined in a state mental institution. Plaintiff seeks reimbursement from the daughter's estate for the maintenance of the mother pursuant to the provisions of section 6650 of the Welfare and Institutions Code of the State of California. (All references to code sections herein are to the Welfare and Institutions Code unless otherwise specified.)

The Complaint sets out all the necessary allegations to support the action; namely:

(a) That on January 15, 1953, Auguste Schaeche was adjudged mentally ill by the Superior Court of the County of San Francisco and committed to Agnews State Hospital, where she has been a patient since the above date, receiving board, care, maintenance and medical attention.

(b) That Ellinor Greene Vance, deceased, was the daughter of said patient, and as such was legally responsible for the support, care, maintenance and medical attention provided to said Auguste Schaeche at Agnews State Hospital, and that said Ellinor Greene Vance died on or about August 25, 1960.

[fol. 19] (c) That pursuant to section 6651 of the Welfare and Institutions Code, the Director of Mental Hygiene determined the rate for care of said patient and that charges were made each month said person was a patient at Agnews State Hospital.

(d) That for the period August 25, 1956, through August 24, 1960, there became due and owing to the Department of Mental Hygiene for the care of said patient, the sum of $7,554.22, and that said sum has not been paid and is now due, owing and unpaid.

(e) That Letters Testamentary were, by order of the Superior Court for the County of San Francisco (SF 154752) issued to Evelyn Kirchner, defendant herein; that said Evelyn Kirchner qualified as administratrix and is now the duly qualified administratrix of the estate of Ellinor Greene Vance, deceased.

(f) That on November 3, 1960, plaintiff filed a verified Creditor's Claim in the sum of $7,554.22 and that said claim was rejected by the administratrix on January 25, 1961.

(g) That there is now due, owing and unpaid from the defendant herein as administratrix of said estate, to the plaintiff herein, the sum of $7,554.22. That defendant herein has failed and refused to pay this sum or any part thereof. Wherefore, judgment was prayed for in the above amount, to be paid in due course of administration.

II

Defendant herein filed a demurrer to said Complaint on [fol. 20] the grounds that the Complaint failed to state a cause of action in that said Complaint did not allege that the incompetent had no estate out of which the claim of plaintiff could be satisfied. Thereafter a hearing was held on said demurrer and said demurrer was overruled on or about June 12, 1961, by the Honorable Edward F. O'Day, Judge of the Superior Court. Thereafter an Answer was filed and said Answer is the subject of this Motion for Judgment on the Pleadings on the ground that it fails to present any defense to the cause of action.

III

The Answer Raises Only Questions of Law; All Issues of Fact Are Admitted by Failure to Deny.

(A) The Answer to the Complaint herein denies paragraph II of said Complaint only insofar as it alleges that

Ellinor Greene Vance, deceased, was legally responsible for the support, care, maintenance and medical attention furnished to Auguste Schaeche at Agnews State Hospital; said Answer denies paragraph VIII of said Complaint insofar as it alleges that defendant is indebted to plaintiff in the amount of $7,554.22. It is clear that these denials are not denials of facts, but are only conclusions of law which must depend for their correctness upon the sufficiency of the facts alleged in the Complaint. It should be noted that Judge O'Day has already ruled once upon the sufficiency of said Complaint.

(B) The first affirmative defense merely restates the contention urged in the demurrer to the same Complaint; that [fol. 21] is, that there is a guardianship estate for this patient from whom reimbursement may be sought by plaintiff herein. For the purposes of this motion plaintiff admits the facts alleged in the first four paragraphs of said affirmative defense. Paragraph V of said defense merely states a legal conclusion that the above facts estop plaintiff from asserting its claim against defendant. It is the purpose of this motion to test the correctness of that conclusion.

(C) The second affirmative defense depends for its sufficiency on the legal conclusion that plaintiff's rights are fully determined and adjudicated by the fact that there is an equitable lien upon the guardianship assets of the estate of Auguste Schaeche securing the claim of the Department of Mental Hygiene for part of the sums expended for the support of said patient, said equitable lien being granted by the Superior Court of San Francisco on October 23, 1958.

Plaintiff will now proceed to demonstrate why none of the above conclusions of law present a defense to plaintiff's cause of action, and therefore, why this court should grant plaintiff's Motion for Judgment on the Pleadings, in favor of plaintiff and against defendant.

IV

The Answer and Affirmative Defenses Present No Defense to Plaintiff's Cause of Action.

(A) A Daughter's Estate Is Clearly Liable for the Support of a Mother in a State Mental Institution.

[fol. 22] Section 6650 of the Welfare and Institutions Code provides in part:

"The husband, wife, father, mother or *children* of a mentally ill person or inebriate, the *estates* of such persons, and the *guardian and administrator of the estate* of such mentally ill person or inebriate *shall* cause him to be properly and suitable cared for and maintained, . . . (and) *shall be liable* for his care, support and maintenance in a state institution of which he is an inmate. The liability of such person and estates shall be a joint and several liability . . ." (Emphasis added.)

The liability of the estate of a daughter is clear from the plain words of the statute. This issue is also completely disposed of by the recent decision of the California Supreme Court in *Department of Mental Hygiene* v. *McGilvery*, 50 Cal. 2d 742 (1958). The court held that section 6650 of the Welfare and Institutions Code made the relatives named therein unequivocally liable for the support and care of the mentally ill person. See also, *Department of Mental Hygiene* v. *Rosse*, 187 A.C.A. 324 (1960); *Department of Mental Hygiene* v. *Shane*, 142 Cal. App.2d Supp. 881 (1956).

Therefore, not only is it plain that the estate of a daughter of a mentally ill person is liable for her mother's care, but it follows from this and from the facts admitted by the Answer's failure to deny, that plaintiff is entitled to a judgment in the amount of $7554.22.

[fol. 23] (B) It Is Immaterial That the Guardianship Estate of the Patient Represents an Additional Joint and Several Obligor Against Whom Plaintiff Could Proceed.

The first affirmative defense merely restates the contention unsuccessfully urged in the demurrer to the Complaint on file herein; that is, that there is a guardianship estate

for this patient from which reimbursement could be sought by plaintiff herein.

That section 6650 (quoted supra) makes the estate of the patient liable for her care is conceded. However, the same code section states that the obligation is a joint and several one. The consequence of a joint and several obligation is that the plaintiff may select from among the obligors the one from whom he seeks reimbursement. The provisions of section 383 of the Code of Civil Procedure apply in such a situation (*Moreing* v. *Weaver*, 3 Cal. App. 14, 22). That section provides: "Persons severally liable on the same obligation . . . may all or *any of them* be included in the same action *at the option of the plaintiff*." (Emphasis added.) Thus, it is legally immaterial that plaintiff could proceed against the estate of the patient instead of against the estate of the decedent daughter of said patient.

Defendant attempts to find an estoppel against plaintiff in her first affirmative defense. Such estoppel is said to be based on the fact that Evelyn Kirchner, who happens to be both the guardian of the estate of the incompetent herein, [fol. 24] and at the same time administratrix for the decedent's estate, (defendant in this action) did attempt to make payment for the care of this patient *out of the guardianship estate*. Of course if full payment were made, this would preclude suit against the decedent's estate by plaintiff for the cost of past care. It should be noted that there is an obvious conflict of interest between Evelyn Kirchner's status as guardian of the estate of this incompetent and her capacity as administratrix of the estate of the patient's daughter. It would seem that her duty as the guardian of the estate to manage the estate frugally and to pay the cost for support of the ward only when necessary (Prob. Code #1502) would make it a violation of her duty to pay a debt to a creditor when the creditor is willing to look to a different joint and several obligor for payment. Her position as administratrix is an interest adverse to the faithful performance of her duties as guardian (Prob. Code #1580(5)).

The full significance of this conflict of interest and the resulting prejudice to the ward is evident if the court takes judicial notice of the probate file of the decedent's estate

herein (SF Probate 154752). Except for a small bequest of $100, Evelyn Kirchner is the sole legatee under the will admitted to probate therein. Therefore, to the extent she uses her status as guardian to pay the cost of care for the ward out of the guardianship estate, she will inherit directly from the decedent's estate of which she is both administratrix and principal legatee.

[fol. 25] It should be noted that payments by the guardian of a ward are strictly regulated not only by the Probate Code, but also by the Welfare and Institutions Code, if the ward is a patient in a state mental hospital. Section 6655 sets up specific conditions precedent to any payment for the care of a person at a state mental hospital out of the guardianship estate. Section 6655 provides in part:

"Payment for the care, support, maintenance, and expenses of a person at a state hospital *shall not be exacted,* however, if there is a likelihood of the patient's recovery or release from the hospital and payment will reduce his estate to such an extent he is likely to become a burden on the community in the event of his discharge from the hospital." (Emphasis added.)

It is a guardian's duty to manage an estate frugally. This requires that she make no disbursements that she isn't required to make. She isn't required to pay for the care of the ward if there is a likelihood of the ward's recovery or release and the estate is small. Thus, it is the guardian's duty not to make payments from the ward's estate until she has determined the presence or absence of this condition. This she has failed to do or to allege having done. Thus, her affirmative defense is defective.

It has already been noted that it is a duty of "every guardian of an estate (to) manage it frugally and without waste, and apply the income, as far as may be *necessary,* [fol. 26] to the comfortable and suitable support . . . of the ward . . ." (Prob. Code #1502). (Emphasis added.) This is clearly a direction to the guardian to preserve the estate of the patient as long as possible. When the guardian fails to preserve the estate of the patient, the Department of Mental Hygiene has a right and duty to do so. *Guardianship of Thrasher,* 105 Cal. App.2d 768 (1951). In the *Thrasher* case the court explained with clarity the

propriety and the duty of the Department of Mental Hygiene to proceed against other joint and several obligors before exhausting the estate of a patient. The court relied on section 6655 (105 Cal. App.2d at 776-7) in holding that the Department of Mental Hygiene could exact payment from the husband on his liability under 6650 and postpone reimbursement from the patient's estate. In *Thrasher*, the guardianship estate would have lasted eight years if the cost of the patient's care were exacted from her estate. Defendant states that there is $10,903.35 in the guardianship estate (Answer 3:10). By defendant's allegation, the lien granted was for $6425.00 accrued as of September 30, 1958, *plus* all amounts accruing since this date. (Answer: 2:25-28, Order attached to Answer.) Using for computation the monthly rates alleged in the Complaint (admitted by defendant's failure to deny), the amount due for the ward's care is far in excess of the total assets of the guardianship estate. If defendant is correct in asserting that the Department must accept payment when offered or be estopped to collect from another obligor, then it is clear that the guardianship estate ($10,903.35) will be completely [fol. 27] exhausted and the patient will be left as a public charge.

(C) An Equitable Lien Against the Guardianship Estate Is Not a Bar to an Action Against Another Joint and Several Obligor, and Therefore Presents No Defense to This Action.

Defendant's second affirmative defense states that because plaintiff has an equitable lien against the guardianship estate, its rights are "fully adjudicated and determined." This is not the law of California. This equitable lien is merely a conditional security interest. Unlike a judgment, it is subject to expenditures from the guardianship estate on behalf of the ward. If the patient were discharged from the state institution she would be entitled to live off that money even though this might destroy plaintiff's lien.

But even if this equitable lien could be compared to a judgment this fact would not present a defense to the action. It is well settled that a judgment against one joint and several obligor is not a bar to a suit against any other

joint and several obligor. (*Williams* v. *Reed,* 113 Cal. App.2d 195 (1952).)

In *Williams,* plaintiff had a judgment against one co-maker of a note. The other co-makers claimed this was a bar to an action against them. The court stated the case thus:

> "Reed's comakers claim that in such a case the bringing of an action against one of the makers (Reed) without joining the others, and obtaining judgment against him alone, bars the plaintiff from later suing any of [fol. 28] the others in respect to that obligation. . . . It is true in most jurisdictions, including California, that *joint* obligors upon the same contract are indispensable parties. They may not be sued separately (Citation). If judgment is obtained in a separate action against one, it bars an action against the others (Citation). When the obligation is *joint and several* it is not non-joinder to sue one alone (Citation). The same is true of an action against one or more and less than all of a number of persons jointly and severally obligated as tort feasors. In such a case the judgment obtained against one is not a bar to an action against the remaining joint and several obligors. . . . (Citation) That being so in respect to joint and several tort obligors, the same should be true of joint and several obligors under a contract. That seems to be the general rule. (39 Am. Jur. 908, Parties, #39, note 1; 4 Corbin on Contracts, 1951, 774-775, #937, note 35.)" 113 Cal. App.2d at 203-4. See also, *Williams* v. *Reed,* 48 Cal.2d 57 at 64 (1957), the same case on a later appeal.

In summary, the fact that the plaintiff has a secured interest (the equitable lien) in the guardianship estate could not affect his right to proceed against another joint and sev- [fol. 29] eral obligor. Therefore, defendant's second defense concerns a wholly immaterial matter and is not a defense to the cause of action stated by plaintiff.

Plaintiff hereby requests that the answer of defendant be stricken and that the motion of plaintiff for a Judgment

on the Pleadings be granted upon the record now on file, the pleadings, and these points and authorities in support of said motion.

Respectfully submitted,

Stanley Mosk, Attorney General of the State of California; John Carl Porter, Deputy Attorney General, Attorneys for Department of Mental Hygiene of the State of California.

[File endorsement omitted]

[fol. 30]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS—Filed November 7, 1961

To the Defendant Above Named and Alan A. Dougherty, Her Attorney of Record Herein:

You and Each of You Will Please Take Notice that on the 27th day of November, 1961, at 10:00 A.M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above entitled court in the City and County of San Francisco, State of California, the above-named plaintiff will move the court for an order of Judgment on the Pleadings in favor of the plaintiff and against defendant on the ground that there is no defense to the action.

Said motion will be made upon the ground that the Answer on file herein fails to state facts sufficient to constitute a defense to the cause of action, or any portion thereof, stated in the Complaint.

Said motion is made and based upon this notice, upon the pleadings, papers, records and files in this action and upon the plaintiff's Memorandum of Points and Authorities served herewith.

Dated: November 3, 1961.

Stanley Mosk, Attorney General of the State of California; John Carl Porter, Deputy Attorney General, Attorneys for Department of Mental Hygiene of the State of California.

[fol. 31] Affidavit of Service by Mail (omitted in printing).

[fol. 32] [File endorsement omitted]

[fol. 33]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS—
Filed November 16, 1961

To the Plaintiff Above Named and Stanley Mosk, Attorney General of the State of California:

You and Each of You Will Please Take Notice that on the 27th day of November, 1961, at 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the above entitled court in the City and County of San Francisco, State of California, the above named defendant will move the court for its order giving defendant judgment on the pleadings in accordance with the prayer of her answer on file herein.

Said motion will be made upon the ground that the Complaint on file herein fails to state facts sufficient to constitute a cause of action against defendant.

Said motion will be based upon this notice, upon the pleadings, papers, records and files in this action and upon defendant's memorandum of points and authorities served herewith.

Dated: November 15, 1961.

Dinkelspiel & Dinkelspiel, By Alan A. Dougherty, Attorneys for defendant.

Memorandum of Points and Authorities

Welf. & Inst. C. 6650 provides in part as follows:

"* * * The husband, wife, father, mother or children [fol. 34] of a mentally ill person or inebriate, and the administrators of their estates, and the estates of such mentally ill person or inebriate, shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. The liability of such persons and estates shall be a joint and several liability, and such liability shall exist whether the mentally ill per-

son or inebriate has become an inmate of a state institution pursuant to the provisions of this Code or pursuant to the provisions of sections * * * ."

Apparently, plaintiff relies on this section as the basis of its claim set forth in the complaint on file herein.

Welf. & Inst. C. 6650 was interpreted by the court in the Guardianship of Thrasher (1951) 105 C.A.2d 768 in which the court held that a husband was liable to the Department of Mental Hygiene under similar circumstances even though the wife had a separate estate or other means out of which the claim of the State Department could have been paid. The Court followed the reasoning set forth in the case of Meyer's Estate, Myrick, Probate Court Report 178 where the court says:

"It is the duty of the husband to maintain the wife, whether she be sane or insane; and while he has the ability so to do, resort cannot be had to her estate."

[fol. 35] In the Thrasher case the court looked to all statutory provisions covering the relationship of husband to wife and his liability therefor and found that there is a primary liability on the part of a husband to support the wife and that the obligation does not cease when the wife is adjudged insane.

In the case before this court the defendant is the estate of a deceased adult daughter; there never was any primary responsibility on the part of the adult daughter to support the mother. To the contrary, there never was a duty of any kind on the deceased daughter to support the mother. C.C. 206 reads in part as follows:

"It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability * * *."

As stated in the case of Guardianship of Thrasher (Supra) the court says:

"* * * All of the statutory provisions in all of the codes must be read together and harmonized if pos-

sible. * * * It is a well recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute."

Therefore, Welf. & Inst. C. 6650 must be read together with C.C. 206.

Further, Welf. & Inst. C. 6650 must be read together [fol. 36] with Welf. & Inst. C. 6655 which reads in part as follows:

"If any person committed to a state mental hospital has sufficient estate for the purpose, the guardian of his estate shall pay for his care, support, maintenance and necessary expenses at the mental hospital to the extent of the estate."

Dinkelspiel & Dinkelspiel, By Alan A. Dougherty, Attorneys for Defendant.

(Proof of Service by Mail Attached)

[File endorsement omitted]

[fol. 37]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

MINUTE ORDER—November 27, 1961

Vol. 655, Page 224

The Court ordered motion for Judgment on the pleadings submitted.

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

MINUTE ORDER—December 1, 1961

Vol. 655, Page 232

Heretofore submitted, Plaintiff's motion for summary judgment granted; Defendant's motion for summary judgment denied.

[fol. 38]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

JUDGMENT—Entered December 15, 1961

Plaintiff having made a motion before this Court for a judgment on the pleadings in favor of plaintiff, defendant having also moved for a judgment on the pleadings in favor of defendant, and the matter having been duly argued and submitted to the Court with Points and Authorities by both parties; Stanley Mosk, Attorney General of the State of California, by John Carl Porter, Deputy Attorney General, appearing for the plaintiff, and Alan A. Dougherty appearing for defendant, and the Court being fully advised in the premises, did, on December 1, 1961, grant the motion of plaintiff for judgment on the pleadings and denied defendant's motion.

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff have judgment against defendant in the sum of $7,554.22;

It Is Hereby Further Ordered, Adjudged and Decreed that plaintiff have judgment against the defendant for the costs of suit incurred herein in the sum of $10.55.

Dated: December 13, 1961

Byron Arnold, Judge of the Superior Court.

Judgment entered

Date: December 15, 1961.

Volume A 37, Page 6.
H. Vanella, Deputy.

[fol. 39] [File endorsement omitted]

[fol. 40]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF ENTRY OF JUDGMENT—Filed December 20, 1961

To the Above Named Defendant and to Her Attorney, Alan A. Dougherty, Esquire:

You and Each of You Will Please Take Notice that Judgment was entered in the above entitled action in favor of plaintiff and against defendant, on December 15, 1961, in the Superior Court, in and for the City and County of San Francisco, State of California; said Judgment being recorded in Volume A37, Page 6.

Dated: December 20, 1961.

Stanley Mosk, Attorney General of the State of California; John Carl Porter, Deputy Attorney General, Attorneys for Plaintiff.

Affidavit of Service by Mail (omitted in printing).

[fol. 41] [File endorsement omitted]

[fol. 42]

IN THE SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF APPEAL AND NOTICE AND REQUEST FOR CLERK'S TRANSCRIPT—Filed December 29, 1961

To the Honorable Byron Arnold, Judge of Said Superior Court, and Stanley Mosk, Attorney General of the State of California, Attorney for Plaintiff:

You, and Each of You, Will Please Take Notice that the defendant in the above entitled action hereby appeals to the District Court of Appeal, First Appellate District, of the State of California, from the judgment in said action rendered in favor of the plaintiff and against the defendant and entered on the 15th day of December, 1961 in Judgment Book A37, Page 6, of the records of the Superior Court of the State of California in and for the City and

County of San Francisco, and from the whole of said judgment.

You will please take further notice that defendant hereby requests that a clerk's transcript be prepared, and that the following papers and records on file or lodged with the clerk be incorporated in the record on appeal, to wit:

1. Complaint for Money Due.

2. Demurrer to Complaint and Memorandum of Points and Authorities.

3. Copy of Minute Order Overruling Demurrer.

4. Notice of Overruling Demurrer.

5. Answer to Complaint.

6. Notice of Motion for Judgment on the Pleadings.

[fol. 43] 7. Plaintiff's Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings.

8. Copy of Minute Order Granting Motion for Judgment on the Pleadings.

9. Judgment.

10. Notice of Entry of Judgment.

11. This notice of appeal and notice and request for clerk's transcript.

Dated: December 27, 1961.

Dinkelspiel & Dinkelspiel, By Alan A. Dougherty, Attorneys for Defendant.

(Proof of Service by Mail Attached)

[File endorsement omitted]

[fol. 44] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 45]

IN THE DISTRICT COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Division One

1 Civil No. 20,576

DEPARTMENT OF MENTAL HYGIENE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

EVELYN KIRCHNER, Administratrix of the Estate of ELLINOR GREEN VANCE, Defendant and Appellant.

OPINION—Filed March 15, 1963

Defendant Evelyn Kirchner, administratrix of the estate of Ellinor Green Vance, appeals from a judgment on the pleadings entered against her and in favor of the plaintiff Department of Mental Hygiene of the State of California for the sum of $7,554.22 and costs for the care, support, maintenance, and medical attention of Auguste Schaeche, mother of defendant's intestate, in a state institution for the mentally ill.

[fol. 46] Plaintiff's complaint filed April 19, 1961, alleges in substance: That on January 15, 1953, Mrs. Schaeche was duly adjudged mentally ill and committed to Agnews State Hospital where ever since said date she has been, and now is, a patient; that Ellinor Vance was Mrs. Schaeche's daughter and as such responsible for her care and maintenance at the above hospital; that pursuant to section 6651 of the Welfare and Institutions Code, the director of mental hygiene determined the rate for the care and maintenance of Mrs. Schaeche and said charges were made continuously for every month said incompetent was a patient; that for the period August 25, 1956, through August 24, 1960, there became due and owing the plaintiff department for the care and maintenance of said incom-

petent the sum of $7,554.22, no part of which has been paid; that the daughter died on August 25, 1960, and the defendant is the duly appointed, qualified and acting administratrix of her estate; that on November 3, 1960, the plaintiff filed in the daughter's estate, its creditor's claim for $7,554.22 for the care and maintenance for the above period of time, which claim was rejected by the defendant administratrix on January 25, 1961; and that the above amount of $7,554.22 is due, owing and unpaid.

Defendant's answer directly controverts only two paragraphs of the complaint: that alleging the daughter's legal responsibility for the care and attention furnished the mother at Agnews State Hospital and the final paragraph alleging the outstanding indebtedness from the daughter's [fol. 47] administratrix, defendant herein. In the answer, therefore, defendant denies that the decedent was legally responsible for such care and maintenance and denies that she, as administratrix, is indebted to the plaintiff in any amount. Defendant by failure to deny them admits the remaining allegations of the complaint.[1] However the answer also sets forth two further and separate defenses in substance as follows: That on October 9, 1956, Ellinor Vance was appointed and qualified as the guardian of the estate of Auguste Schaeche, an incompetent person; that on October 23, 1956, on petition of the plaintiff department filed in such guardianship proceeding, the court made its order giving the department an equitable lien on the estate of the incompetent for $6,425 for accrued charges for care, maintenance and medical attention for the period ending September 30, 1958, and for such other sums as may become due in the future; that after the death of Ellinor Vance on August 25, 1960, and on January 16, 1961, the defendant Evelyn Kirchner was appointed guardian of the estate of Auguste Schaeche; that said defendant as such guardian thereafter sold certain real property of the guardianship

[1] It should be noted therefore that the defendant admits the allegations that the director of mental hygiene determined the rate and made continuous monthly charges for the care and maintenance of the incompetent, that for the period involved a total of $7,554.22 became due and owing to the department, and that no part of said sum was paid.

estate for the net amount of $10,903.35, which amount is on deposit at a local title company; that defendant as guard- [fol. 48] ian of the estate of said incompetent[2] requested of the plaintiff department an itemized statement of the amount due for the care and maintenance of the incompetent so that such amount could be presented to the court and paid, but that the plaintiff refused and continues to refuse to render such statement; that because of such refusal "plaintiff should be estopped" from asserting its claim against the estate of Ellinor Vance; that, additionally, the plaintiff's rights have been adjudicated by the order made in the guardianship proceeding on October 23, 1958.

Plaintiff moved for judgment on the pleadings on the ground that there was no defense to its action. Defendant filed a similar motion on the ground that the complaint failed to state facts sufficient to constitute a cause of action against the defendant. The court below granted plaintiff's motion and denied defendant's motion. This appeal followed.

"The plaintiff, by his motion for judgment on the pleadings, may recover judgment without the introduction of any evidence if his comp.. int states facts sufficient to constitute a cause of action, and if the answer . . . neither raises any material issue nor states a defense—that is, where the answer expressly or substantially admits or does not sufficiently deny all the material allegations of the complaint, and sets up no new matter sufficient to bar [fol. 49] or defeat the action." (39 Cal.Jur.2d, Pleading, § 307, pp. 420-421; see *Adjustment Corp.* v. *Hollywood Hardware etc. Co.* (1939) 35 Cal.App.2d 566, 569-570 [96 P.2d 161].) On such a motion the allegations of the answer must be taken as true and the plaintiff admits, for the purpose of the motion, the untruth of his own allegations, so far as they have been controverted by the answer. (*Osborne* v. *Abels* (1939) 30 Cal.App.2d 729, 731 [87 P.2d 404].)

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[2] It should be noted that after January 16, 1961, Evelyn Kirchner defendant herein was not only administratrix of the estate of the daughter (Ellinor Vance) but also guardian of the estate of the mother (Auguste Schaeche).

The material allegations of the complaint before us not controverted by the defendant establish that the incompetent Auguste Schaeche was a patient at Agnews State Hospital and that charges for her care and maintenance, at rates determined according to statute, are owing and unpaid to the department in the total amount of $7,554.22. Briefly summarized, the answer simply denies that the daughter of the incompetent was legally responsible for such indebtedness and further denies the allegation (conclusionary in form) that such amount is due, owing and unpaid from the daughter's administratrix. The answer in addition asserts that the daughter was an adult and that the mother's own guardianship estate had adequate funds to pay the indebtedness, which funds were themselves secured to plaintiff by an equitable lien. Thus the answer raises no factual issues requiring a trial but merely the legal claim of the defendant that the decedent daughter was not liable for the above charges. Plaintiff's motion for a judgment on the pleadings was therefore an appropriate remedy to determine the basic controversy. (See *Bank of* [fol. 50] *America* v. *Hirsch Mercantile Co.* (1944) 64 Cal.App.2d 175, 176, 181 [148 P.2d 110].)

Defendant contends here that (1) the estate of an adult child is not liable to the Department of Mental Hygiene for the care and maintenance of an incompetent mother in a state institution where the mother has adequate funds of her own to pay the charges therefor; and (2) the department was required to proceed against the mother's property on which it had an equitable lien. Neither contention has merit.

Section 6650 of the Welfare and Institutions Code,[3] in effect during the four-year period here involved, provides in relevant part: "The husband, wife, father, mother, or *children* of a mentally ill person or inebriate, the estates of such persons, and the guardian and administrator of the estate of such mentally ill person or inebriate, *shall cause* him to be properly and suitably cared for and maintained, . . . The husband, wife, father, mother, or *children*

[3] Unless otherwise indicated, all code references hereafter are to the Welfare and Institutions Code.

of a mentally ill person or inebriate, and the *administrators of their estates*, and the estate of such mentally ill person or inebriate, *shall be liable* for his care, support, and maintenance in a state institution of which he is an inmate. *The liability of such persons and estates shall be a joint and several liability*, . . ." (Italics added.)

The above statute imposes on the persons therein named an unconditional liability for the support and maintenance of a mentally ill relative in a state institution. (*Depart-*
[fol. 51] *partment of Mental Hygiene* v. *McGilvery* (1958) 50 Cal.2d 742, 749-751 [329 P.2d 689]; *Department of Mental Hygiene* v. *Rosse* (1960) 187 Cal.App.2d 283, 286 [9 Cal.Rptr. 589]; *Department of Mental Hygiene* v. *Shane* (1956) 142 Cal.App.2d Supp. 881, 883 [299 P.2d 747].)[4] It is clear that it imposes such liability on a daughter of a mentally ill person and on such daughter's estate.

Defendant argues that Ellinor Vance, being an adult daughter, had no "primary duty" to support her mother, Mrs. Schaeche, and that if any liability is to be imposed on the daughter or the daughter's estate, "it must be shown that not only the mother had no funds but that the daughter had the ability to pay."

The liability created by section 6650 is unconditionally imposed and not dependent on ability to pay. (*Department of Mental Hygiene* v. *McGilvery, supra,* 50 Cal.2d 742, 749-751; *Department of Mental Hygiene* v. *Mannina* (1959) 168 Cal.App.2d 215, 217 [335 P.2d 694, 337 P.2d 219].) Nor is it made dependent upon the existence of a "primary duty" to furnish support. The above statute makes no mention of such expression. It clearly imposes liability, as defendant concedes, on the estate of the mentally ill per-
[fol. 52] son. It also expressly provides that the liability of the persons and estates named in the statute "shall be

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[4] It has recently been held in *Department of Mental Hygiene* v. *Hawley* (1963) [*] 59 Cal.2d ____ [____ Cal.Rptr. ____, ____ P.2d ____] that the liability imposed by section 6650 does not extend to the costs of support and maintenance of a person charged with crime who at the time of trial has been determined to be insane and, trial being postponed, is detained in a state institution pending his recovery.

[*] Advance Report Citation: 59 A.C. 259.

a joint and several liability." The law is settled that where an obligation is joint and several, any or all of the persons obligated may be compelled to pay the indebtedness. A person thus liable may be sued alone without joining any others also liable. In the case at bench, therefore, it was permissible for the Department of Mental Hygiene to enforce the statutory liability against the daughter of the mentally ill person without proceeding against the mentally ill person herself. (*Moreing* v. *Weber* (1906), 3 Cal.App. 14, 21-22 [84 P. 220]; *McClintick* v. *Frame* (1929) 98 Cal.App. 338, 343 [276 P. 1033]; Code Civ. Proc., § 383.)

Defendant relies on *Guardianship of Thrasher* (1951) 105 Cal.App.2d 768 [234 P.2d 230] and *Department of Mental Hygiene* v. *Black* (1961) 198 Cal.App.2d 627 [18 Cal.Rptr. 78]. She claims that these cases establish that, where a person has a "primary obligation" to support an incompetent, such person becomes liable under section 6650 regardless of the ability of the estate of the incompetent to pay. However, defendant argues, since an adult daughter has no such primary duty to support an incompetent mother who has an adequate estate, no liability arises under the statute. As we have pointed out, such a conclusion is untenable in the light of the clear provisions of the statute and the decisions interpreting it. Nor are the above two cases cited by defendant in conflict with what we have said. In *Thrasher, supra,* the court in effect held [fol. 53] that it was error for the probate court to permit a husband who was guardian of his incompetent wife to reimburse himself from the wife's estate for amounts paid by him to the Department of Mental Hygiene for support and maintenance of the wife at a state hospital. The department had objected to the settlement of the accounts on the ground that the wife's support was the personal liability of the husband. On appeal the department contended that such liability rested on two separate bases: (a) the fact that the husband was primarily responsible for the support of his wife; and (b) the fact that he had a statutory liability under section 6650 for her support in a state hospital for the mentally ill. The court gave recognition to both obligations and harmonizing all of

the applicable statutes held that the husband being primarily liable for the wife's maintenance could not draw upon her estate for it. However the court did not hold, as defendant here argues, that the husband's liability on the second basis, that is under section 6650, arose *only because* of his liability on the first basis, that is, because of his "primary duty" as a husband to support his wife. In *Black, supra,* it was held that the Department of Mental Hygiene could recover from the estate of the mother of a mentally ill person the cost of the latter's support in a state hospital. The court stated: "The incompetent's mother being a person liable for her maintenance and care (Welf. & Inst. Code, § 6650), there is thus no merit to the first of appellant's contentions that the personal assets of the incompetent patient must first be exhausted [fol. 54] before liability is imposed on responsible relatives." (198 Cal.App.2d at p. 632.) It is clear that the court held the statute imposed liability *ex proprio vigore* and not because of any independent "primary duty" on the part of the mother to support her daughter. Neither *Thrasher* nor *Black,* therefore, restrict or qualify the express declaration of joint and several liability found in section 6650.

Nor is either of the above cases authority for the proposition urged by defendant that the estate of the mentally ill person must first be exhausted before liability under section 6650 can be imposed upon any of the other persons named in the statute. As we have already pointed out, the liability of the persons and estates named in the statute is unconditional and absolute (*Department of Mental Hygiene* v. *McGilvery, supra,* 50 Cal.2d 742) and "a joint and several liability" (§ 6650). It is therefore unimportant that the estate of the mentally ill person can be resorted to and unnecessary that such action first be taken. The contention here made by defendant that the assets of the incompetent must be first exhausted was flatly rejected, as noted above, in *Department of Mental Hygiene* v. *Black, supra,* 198 Cal.App.2d 627, 632.

We observe that such was not always the law. After the 1941 amendment of section 6650 (Stats. 1941, ch. 916, § 1, p. 2503) that portion of the statute pertinent here read

substantially as it now reads except that it then provided: "The liability of such persons and estates shall be a joint and several liability *except that where the insane person* [fol. 55] *or inebriate has an estate such estate shall be exhausted before liability passes to the relatives.*" (Italics added.) The 1943 amendment to the statute (Stats. 1943, ch. 1052, § 1, p. 2991) omitted the above italicized language. As was stated in *People* v. *Valentine* (1946) 28 Cal.2d 121, 142 [169 P.2d 1]: "It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law. [Citation.] It has been repeatedly declared that where changes have been introduced by amendment it is not to be assumed that they were without design and, further, that by substantially amending a statute the Legislature demonstrates an intent to change the pre-existing law."

Defendant's final claim, made without analysis or citation of authority, that the instant judgment constitutes the taking of her property without due process and a denial of the equal protection of the laws need not detain us. Such claims were raised and set at rest in *Department of Mental Hygiene* v. *McGilvery, supra,* 50 Cal.2d 742, 754-761.

We turn to the defendant's second contention on appeal. She argues: The plaintiff petitioned for and secured in the guardianship proceedings of Mrs. Schaeche an equitable lien on the estate of the incompetent for accrued charges in the sum of $6,425 and also for future charges. Since this lien is still in effect, the plaintiff Department of Mental Hygiene must proceed against such security in accordance with the "one form of action" rule prescribed by [fol. 56] section 726 of the Code of Civil Procedure and therefore is precluded from proceeding against another liable on the obligation, namely this defendant. We find no merit in the above argument.

To support her position, the defendant is content to assert that the equitable lien here involved is the same security as a mortgage citing *Estate of Moore* (1955) 135 Cal.App.2d 122, 131 [286 P.2d 939], in which the court quoted from *Childs etc. Co.* v. *Shelburne Realty Co.* (1943) 23 Cal.2d 263, 268 [143 P.2d 697]: "a mortgagee also has

a security interest in the nature of an equitable lien." We are not favored with any further analysis of the legal equation which defendant thus proposes. Nor does defendant cite us to any authority holding that an equitable lien of the kind presented here falls within the pertinent statute.

Plaintiff claims that the instant equitable lien resembles more a judgment lien than a mortgage, since both the equitable lien and the judgment lien are non-consensual and are designed to expand the creditor's remedies rather than to contract them as does section 726 of the Code of Civil Procedure. Plaintiff also points out: Code of Civil Procedure section 726 does not encompass all liens but by its terms prescribes the "one form of action" rule for the recovery of a debt or enforcement of a right "secured by *mortgage* upon real or personal property." (Italics added.) It later encompassed trust deeds as a result of the decision in *Bank of Italy etc. Assn.* v. *Bentley* (1933) 217 Cal. 644 [20 P.2d 940]. It has been held not to apply to a vendor's lien (*Jones* v. *Evans* (1907) 6 Cal.App. 88 [fol. 57]. [91 P. 532]), to a judgment lien (*Lisenbee* v. *Lisenbee* (1919) 42 Cal.App. 567 [183 P. 862]) or to a mechanic's lien (*Martin* v. *Becker* (1915) 169 Cal. 301 [146 P. 665, Ann.Cas. 1916D 171]), the creditor not being required in any of such instances to first exhaust his security. We think plaintiff's analysis of the nature of the equitable lien before us, made in the light of the above precedents, is sound. Neither of the parties has referred us to, nor has our own research disclosed, any case holding that such lien falls within the purview of the statute. In view of the above authorities, we are of the opinion that it does not.

However, even if we assume, *arguendo*, that the instant lien falls within the statute in question, we fail to see how this would give support to the position defendant takes. It is well settled that section 726 of the Code of Civil Procedure is for the protection of the mortgagor and that the liability of persons independently obligated to pay the same debt may be enforced without first resorting to the mortgage security. (*Leob* v. *Christie* (1936) 6 Cal.2d 416, 418 [57 P.2d 1301] and cases there cited:

Stephenson v. *Lawn* (1957) 155 Cal.App.2d 669, 671 [318 P.2d 132].) *Appel* v. *Hubbard* (1957) 155 Cal.App.2d 639 [318 P.2d 164] cited by defendant is not in conflict with the foregoing rule. The only person coming within the protective provisions of the statute is the mortgagor or, as the *Stephenson* case uses the term, the principal debtor, which corresponds here to the owner of the liened property, [fol. 58] the incompetent Auguste Schaeche. The instant action is not against Mrs. Schaeche.

The judgment is affirmed.

Sullivan, J.

Bray, P. J., and Molinari, J., concurred.

[File endorsement omitted]

[fol. 59] [File endorsement omitted]

[fol. 60]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. 21349

DEPARTMENT OF MENTAL HYGIENE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

EVELYN KIRCHNER, Administratrix of the Estate of ELLINOR GREEN VANCE, Defendant and Appellant.

APPELLANT'S PETITION FOR A HEARING BY THE SUPREME COURT—Filed April 24, 1963

After Decision by the District Court of Appeal, State of California, First Appellate District, Division One, and Numbered Therein 1 Civil No. 20,576.

City and County of San Francisco, Honorable Byron Arnold, Judge.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Defendant and appellant, Evelyn Kirchner, Administratrix of the Estate of Ellinor Green Vance, hereby petitions for a hearing of the above cause after decision by the District Court of Appeal, First Appellate District, Division One.

[fol. 61]

I.

Statement of Case

The defendant is the Administratrix of the Estate of Ellinor Green Vance, who was the adult daughter of Auguste Schaeche, an incompetent and a patient at Agnews State Hospital. Defendant appealed from a judgment on the pleadings against her and in favor of plaintiff for the sum of Seven Thousand Five Hundred Fifty-Four Dollars Twenty-Two Cents ($7,554.22) for the care of the incompetent mother even though the mother had an estate of her own in the amount of Ten Thousand Nine Hundred Three Dollars Thirty-Five Cents ($10,903.35). The District Court of Appeal, First Appellate District, Division One, in an opinion filed March 15, 1963, affirmed the judgment of the Superior Court (a copy of the decision is annexed to this petition as Appendix A).

II.

Grounds for Hearing

Defendant submits that a hearing in this case is necessary to settle the following questions of law and to secure uniformity of decision relating thereto:

(a) Does Welf.C. 6650 impose an unconditional and absolute liability upon an adult child, or her estate, for the care of an incompetent mother by the Department of Mental Hygiene where the mother has adequate funds of her own to pay the charges therefor?

[fol. 62] (b) If the answer thereto is in the affirmative would a judgment under such a statute constitute the tak-

ing of defendant's property without due process and a denial of the equal protection of the law?

III.

Statement of Facts

The Department of Mental Hygiene brought this action against the Estate of Ellinor Green Vance, a deceased adult daughter of Auguste Schaeche, a patient at Agnews State Hospital (CT 3:7-17). The purpose of the suit was to obtain reimbursement for the care provided Auguste Schaeche from August 25, 1956 to August 24, 1960, or for Seven Thousand Five Hundred Fifty-Four Dollars Twenty-Two Cents ($7,554.22) (CT 4:8).

Evelyn Kirchner is the duly appointed Administratrix of the Estate of Ellinor Green Vance (CT 4:12-19). She is also the guardian of the Estate of Auguste Schaeche, the incompetent (CT 16:2). It does not appear from the record before the court who are the beneficiaries in the Estate of Ellinor Green Vance, or who may be the heirs of the incompetent. Nor does it appear from the record whether there are others claiming as creditors against the estate of the decedent.

Evelyn Kirchner, as Administratrix of the decedent's estate, on January 25, 1961, rejected the creditor's claim [fol. 63] filed by the Department of Mental Hygiene (CT 5:5), and then in her capacity as the guardian of Auguste Schaeche she offered to pay the claim out of the assets of the incompetent's estate (CT 16:9-15). The Department of Mental Hygiene refused to accept payment from the guardian (CT 16:9-15), and in due course plaintiff brought this action on April 16, 1961.

Defendant demurred to the complaint on the ground that no cause of action was stated in that the complaint did not allege that the incompetent had "no estate out of which the claim of plaintiff * * * [could] be satisfied" (CT 7:8-11). The demurrer was overruled (CT 11:19), and the defendant answered denying only liability (CT 14) and set up two separate defenses. First, that since plaintiff refused to present a bill for payment when requested by Evelyn Kirchner, acting in her capacity as guardian, that the Department should be estopped from asserting the same

against the estate of the adult daughter (CT 16:17-20). Second, that since the Department had previously on October 23, 1958, obtained an order in the guardianship proceeding giving the Department an equitable lien on the estate of the incompetent for the sum of Six Thousand Four Hundred Twenty-Five Dollars ($6,425.00) as accrued charges for the period ending September 30, 1958, and for such other sums as may become due the Department for further support of the incompetent (CT 15:11-23) the "rights of plaintiff have been fully adjudicated and determined" (CT 16:26; 17:1).

[fol. 64] Plaintiff and defendant each moved for a judgment on the pleadings; plaintiff's motion was granted and defendant's was denied.

IV.

Arguments

A. The Decision Below Is Contrary to Guardianship of Thrasher.

The District Court in the present case says that the liability of the persons and estates named in Welf.C. 6650 is unconditional and absolute and contends that its decision is in agreement with the *Guardianship of Thrasher* (1951) 105 C.A. 2d 768. We believe that Thrasher holds that Welf.C. 6650 must be read with all other applicable code sections. That sometimes the liability imposed by the combined sections is absolute, and in other situations it is a secondary liability, or is non-existent.

In determining the liability of a husband in *Thrasher* the court considered Welf.C. 6650, 6655; Prob.C. 1505; and C.C. 155, and endeavoring to read all of these related statutes together as one statute the court says at page 777:

> "We believe that the reasonable and proper construction of all of the applicable sections is that the husband of a wife who has been committed to a mental institution is primarily liable for her maintenance there to the extent of his financial ability to pay for it; that if she has estate over which a guardian is appointed, [fol. 65] he may not draw upon such estate for her maintenance so long as he has the financial ability to

pay for same; that it is not only the right but it is the duty of the Department of Mental Hygiene to protect and preserve the estate of a person legally committed to its care; that the Welfare and Institutions Code provides the means and method by which the state may receive payment from the insane person's estate, but this in no way releases the husband from his primary obligation, nor does it prevent the department from making proper objections in the guardianship proceeding to the shifting of said obligation to the guardianship estate."

In the case before the court the combination of statutes to be considered is different; out must go C.C. 155 and Prob.C. 1505 and in lieu thereof is C.C. 206 which reads in part as follows:

"It is the duty of the father, mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. * * *."

C.C. 206 adds the requirement of need and ability to pay, and there is nothing that we can find in the legislation leading up to Welf.C. 6650 that nullifies C.C. 206. As stated in *Thrasher* at page 777:

"* * * * We do not believe that it was the intention of the Legislature to overrule or ignore the provision of the Civil Code establishing the fundamental rights and duties of marriage, * * *."

In light of the foregoing it would appear that a reasonable construction of the applicable statutes would impose [fol. 66] liability upon an adult child only where the parent is in need.

B. The Decision Below Denies the Defendant Equal Protection of the Law.

As stated by this court in *Department of Mental Hygiene* v. *McGilvery* (1958) 50 C. 2d 742, 755:

> "The obvious purpose of the particular provisions of the statute here involved is to minimize the cost to the state and its agencies in providing assistance to the needy and distressed, by exacting contributions from persons standing in close relationship to those assisted. Accordingly, the classification which is claimed to have placed the deceased in a class apart must be shown to have a reasonable and substantial relation to the accomplishment of that purpose if the code provisions which are attacked are to withstand the claims of invalidity."

Welf.C. 19 provides in part:

> "The purpose of this code is to provide for protection, care, and assistance to the people of the State in need thereof, and to promote the welfare and happiness of all of the people of the State by providing public assistance to all of its needy and distressed."

The incompetent in the case before the court is not "needy and distressed"; she has an estate of her own, and it may be larger than the daughter's.

Of course, if the daughter were a person primarily liable for the support of the incompetent such as a husband was [fol. 67] found to be liable for the support of a wife in the case of *Thrasher*, the question of improper classification would not arise. In *Thrasher* the liability was not based upon the need of the incompetent but upon the liability of a husband to support a wife. The same distinction was made in *Department of Mental Hygiene* v. *Black* (1961) 198 C.A. 2d 627. The obligation of a parent to support an afflicted child is an absolute one and has existed from time immemorial.

There is no such duty cast upon a child to support a parent. At 37 *Cal.Jur.* 2d 226 it is summarized as follows:

> "Although text writers have occasionally referred to a 'natural obligation' of support which child owes to the parent, the common law recognizes no legal obligation of the sort, and accords to the parent no remedy against the child for non-support. Hence, in construing the statute creating the obligation, the tendency of

the court is to attribute to the language thereof a limited rather than a comprehensive meaning. * * *"

According, we contend that unless the need of the parent is first shown, the defendant is improperly and arbitrarily classified as a person liable under the scheme of the legislation in question.

[fol. 68]

C. The Decision Below Constitutes a Taking of Private Property Without Just Compensation.

This court in *McGilvery* quoted with approval from *State Commission in Lunacy* v. *Eldridge* (1908) 7 Cal. App. 298 as follows:

"* * * certainly the payment of the expense or a part thereof, for the care and maintenance of one's relative, incapable of taking care of himself, could not be the taking of private property for a public use without compensation, since for the expenditure required a substantial equivalent is given by the agents of the state having management of the institution * * *"

Again, the determining factor appears to be the need of the relative assisted. In *McGilvery* and *Eldridge* the incompetents were needy persons and the state was supporting them.

As stated at 11 *Cal.Jur.* 2d 820:

"In determining due process in a given case, respect must be had to the cause and object of the taking, whether under the taxing power the power of eminent domain, the power of assessment for local improvements, or some other power. If found to be suitable or admissible in the special case, the proceeding will be adjudged to comply with the constitutional requirements; but if found to be arbitrary, oppressive, or unjust, it may be declared to be lacking in due process."

The taking of the deceased daughter's property to provide for the support of a mother who already has an estate of her own does not come within constitutional requirements.

[fol. 69]

V.

Conclusion

As the law now stands under the decision of the District Court in the present case all relatives mentioned in Welf.C. 6650 can be required to support those incompetents under the care of the Department of Mental Hygiene regardless of the financial circumstances of the parties, and further there is no requirement that the incompetent repay the relatives upon his release out of his own personal estate. The relatives mentioned under Welf.C. 6650 would be subject to the uncontrolled authority of the Department of Mental Hygiene to commence collection proceedings against them at any time regardless of the needs of the incompetent or the ability of the relative to pay. This does not reflect the yardstick of fair play generally expressed in due process.

Dated, Redwood City, California, April 15, 1963.

Respectfully submitted,

Dinkelspiel & Dinkelspiel, By Alan A. Dougherty,
Attorneys for Appellant and Petitioner.

[fol. 70] [File endorsement omitted]

[fol. 71]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. 21349

[Title omitted]

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR A HEARING BY THE SUPREME COURT—filed May 6, 1963

After Decision by the District Court of Appeal, State of California, First Appellate District, Division One, and Numbered Therein 1 Civil No. 20,576

City and County of San Francisco

Honorable Byron Arnold, Judge

[fol. 72] To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California

Introduction

In the trial court, both parties moved for Judgment on the Pleadings. Plaintiff's motion was granted and that of the defendant was denied. Defendant appealed principally on the ground that before relatives of a state mental patient could be required to assist in meeting the cost of hospitalization, the patient's assets must be exhausted. The District Court of Appeal rejected the contention and affirmed the judgment below. Appellant now petitions this court for a hearing on the same ground.

Facts

The Department of Mental Hygiene brought an action against the estate of Ellinor Green Vance, a deceased adult daughter of Auguste Schaeche, a patient at Napa State

Hospital since 1953 (Pet. 3; Op. ii).[1] The purpose of the suit was to obtain reimbursement for the care provided [fol. 73] to Mrs. Schaeche for the four years preceding Mrs. Vance's death. (Pet. 3; Op. ii.)

Evelyn Kirchner is the duly appointed Administratrix of the Estate of Ellinor Vance (Pet. 3; Op. iv). She is also the guardian of the estate of Mrs. Schaeche, the incompetent (Op. iv). Acting as Administratrix of the decedent's estate, Evelyn Kirchner, on January 25, 1961, rejected the creditor's claim filed by the Department of Mental Hygiene (Op. ii) and then in her capacity as the guardian of Auguste Schaeche, offered to pay the claim out of the assets of the incompetent (Op. iii-iv). The Department of Mental Hygiene refused to accept payment from the guardian and filed its action against the Administratrix. Appellant demurred on the sole ground that no cause of action was stated because the Complaint failed to allege that the incompetent had "no estate out of which the claim of plaintiff . . . [could] be satisfied." (Pet. 4.)

The Demurrer was overruled and an answer was filed which only denied liability (Pet. 4) and set up two separate defenses.

Defendant's first contention was that because the Department of Mental Hygiene refused to present an itemized bill for payment when requested by Evelyn Kirchner, act-[fol. 74] ing in her capacity as guardian, that the Department should be estopped from asserting the same claim against the decedent's estate.

The second defense was that because the Department of Mental Hygiene had, in 1958, in order to avoid liquidating the patient's assets, obtained an equitable lien in the guardianship estate of the incompetent to secure its rights, as against the patient, for possible reimbursement at a later date. The "rights of plaintiff have been fully adjudicated and determined." (Pet. 4; Op. iii.) Therefore, the Department of Mental Hygiene was entitled to nothing from the estate of the daughter of the patient.

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[1] The opinion of the District Court of Appeal is set out in the Appendix of the Petition for Hearing, therefore, reference will be made to it as "Op." and to the Petition itself as "Pet.".

As already noted, appellant denied only the legal conclusion of the liability of decedent's estate admitting thereby all the factual allegations of the Complaint. Plaintiff Department of Mental Hygiene also admitted all the factual allegations of defendant's Answer. With no factual questions to resolve, *both* parties moved for Judgment on the Pleadings (Op. iv-v). The motion of plaintiff Department of Mental Hygiene was granted and that of defendant was denied.

Defendant appealed the granting of the motion. The District Court of Appeal affirmed the judgment below in a thorough, carefully reasoned opinion by Mr. Justice Sullivan.

[fol. 75] Question Presented

Is the Department of Mental Hygiene required to exhaust the patient's estate before it can look for reimbursement to any other obligor whose liability for the cost of the patient's care is by statute joint and several?

Argument

Appellant has unfairly "loaded the question" presented to the court by adding the statement that the patient "has adequate funds of her own to pay the charges therefor." (Pet. 2.)

Appellant alleges that the patient has an estate in the amount of $10,903.35 and that, therefore, within the meaning of Civil Code section 206, the patient is not a "needy"[2] or poor person unable to maintain herself; therefore, she reasons, there is no liability on the patient's daughter or her estate. (Pet. 6.)

[fol. 76] However, the appellant acknowledges that as of October 23, 1958, the estate of the patient was encumbered

[2] The element of "need" is introduced by reference to sections of the Civil Code which are not even pertinent. On the question of reimbursement from relatives of patients in state hospitals, the Welfare and Institutions Code is exclusive. *Department of Mental Hygiene* v. *Shane*, 142 Cal.App.2d 881. See also *County of San Bernardino* v. *Simmons*, 46 Cal.2d 394, 398 (1956).

by a lien in the amount of $6,425 which secured accrued charges as of that date and for *all other future charges.* (Pet. 4.) In other words, the equity the patient had as of 1958 was less than $4,000 and that remaining equity was completely wiped out by the accrual of charges since that date. Stating that the patient has "adequate funds of her own," in these circumstances, is very much like saying that a person with no assets other than a home valued at $10,000 but with encumbrances of *over* $10,000 has ample estate to meet other obligations. The only reason this patient had anything left in her estate was that the Department was attempting to protect and preserve the assets of the patient for her future care and attempting to comply with the mandate of section 6655 of the Welfare and Institutions Code which *prohibits* the Department from the asking for support from the patient's estate if such "payment will reduce the estate to such an extent that he is likely to become a burden on the community in the event of his discharge from the hospital." The record is bare of any showing by appellant that the patient's estate is of such [fol. 77] size that this mandate could be complied with. The appellant seems to contend that the Department should confiscate the entire estate of each patient in order to make meaningful the joint and several liability of the relatives (see section 6650).

It would be incredible to think that the unmercenary and humanitarian policy the Department has followed in the treatment of the patient and her estate can operate to absolve all other relatives from responsibility for the patient's hospitalization.

I. The Decision Is Not Contrary to the Guardianship of Thrasher.

Before the District Court of Appeal and in his Petition (p. 5), appellant has attempted to construe the *Guardianship of Thrasher* (105 Cal.App.2d 768) as holding that the husband in that case was "primarily" liable and that the patient's estate was only a secondarily liability. In that case, the husband guardian paid for his wife's hospitaliza-

tion but sought reimbursement from her estate. The court refused to allow him to do so because a husband always has an obligation to support his wife, and because under 6650 a husband is jointly and severally liable for his wife's [fol. 78] hospitalization. On this point, the District Court of Appeal here said:

> ". . . the court did not hold, as defendant here argues, that the husband's liability on the second basis, that is under section 6650, arose *only because* of his liability on the first basis, that is, because of his 'primary duty' as a husband to support his wife." (Emphasis by the court.) (Op. ix.)

The District Court of Appeal did, in this case, precisely as did the court in *Thrasher*. That is, they protected the estate of the patient. The court also quoted from the *Department of Mental Hygiene* v. *Black*, 198 Cal.App.2d 627 at 632 (1961):

> "The incompetent's mother being a person liable for her maintenance and care (Welf. & Inst. Code, §6650), there is thus no merit to the first of appellant's contentions that the personal assets of the incompetent patient must first be exhausted before liability is imposed on responsible relatives."

The court in the instant case also noted:

> "that the court [in Black] held the statute imposed liability *ex proprio vigore* and not because of any independent 'primary duty' on the part of the mother to support her daughter. Neither *Thrasher* nor *Black*, therefore, restrict or qualify the express declaration of joint and several liability found in section 6650." (Op. x.)

Thus the District Court of Appeal here found that *Thrasher* supported its decision, both as to its rationale of unrestricted joint and several liability and its result in preserving at least some of the patient's assets.

[fol. 79]

II. The Court Properly Concluded That the Legislative History of 6650 Did Not Require Exhaustion of the Patient's Assets Before Other Relatives Could Be Made Responsible.

The District Court of Appeal also demonstrated that the legislative history of section 6650 compelled the same result. From 1943, until it was repealed in 1945, the joint and several liability was expressly conditioned by a statement that:

> "except that where the insane person or inebriate has an estate such estate shall be exhausted before liability passes to the relatives."

The court correctly observed that it is to be presumed that when the Legislature deletes an express provision of a statute, it intends to make a change in law.

III. The District Court of Appeal Correctly Concluded That Any Joint and Several Obligor May Be Sued Alone.

In discussing the joint and several liability imposed by 6650, the court below stated:

> "The law is settled that where an obligation is joint and several, any or all of the persons obligated may be compelled to pay the indebtedness. A person *thus* [fol. 80] *liable may be sued alone without joining any others also liable.* In the case at bench, therefore, it was permissible for the Department of Mental Hygiene to enforce the statutory liability against the daughter of the mentally ill person without proceeding against the mentally ill person herself. (*Moreing* v. *Weber* (1906), 3 Cal.App. 14, 21-22 [84 P. 220]; *McClintick* v. *Frame* (1929) 98 Cal.App. 338, 343 [276 P. 1033]; Code Civ. Proc., §83.) (Emphasis added.)

It should be observed that the defendant did not attempt to require joinder of the patient's estate as another defendant. The Administratrix was content to assert that until the patient was rendered destitute, the Department could proceed against no one else. Such a position is untenable.

IV. Appellant Violates Her Fiduciary Duty As Guardian By Utilizing Her Ward's Assets to Her Personal Advantage.

Evelyn Kirchner is both Administratrix of this estate and guardian of the estate of the patient here concerned (Pet. 3; Op. iv). Acting as Administratrix she rejected respondent's creditor's claim and then offered to pay the sums due from her ward's estate (Pet. 3-4; Op. iv).

Of course, if full payment were made, this would preclude suit against the decedent's estate by plaintiff for the [fol. 81] cost of past care. It should be noted that there is an obvious conflict of interest between Evelyn Kirchner's status as guardian of the estate of this incompetent and her capacity as Administratrix of the estate of the patient's daughter. Her duty as guardian to manage the estate frugally and to pay the cost for support of the ward only when necessary (Prob. Code §1502) is violated when she offers to pay a debt to a creditor who is willing to look to a different joint and several obligor for payment. Her position as Administratrix is an interest adverse to the faithful performance of her duties as guardian (Prob. Code §1580(5)) and would justify her removal.

The full significance of this conflict of interest and the resulting prejudice to the ward is evident if the court takes judicial notice of the probate file of the decedent's estate herein (SF Probate 154752).[3] Except for a small bequest of $100, Evelyn Kirchner is the sole legatee under the will admitted to probate therein. Therefore, to the extent she [fol. 82] utilizes the estate of her ward to pay the cost of care for the ward she personally benefits by increasing the amount she will inherit from the decedent's estate (of which she is both Administratrix and principal legatee).

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[3] The appellant contends these matters are not properly before the court; but the trial court was asked to take judicial notice of this probate file (CT 24:18). The appellate court must presume that it did so. *Legg* v. *Mutual Benefit Ass'n*, 184 Cal.App.2d 482 at 488 (1960); *Stafford* v. *Ware*, 187 Cal.App.2d 227 at 236 (1960); *Alisal Sanitary Dist.* v. *Kennedy*, 180 Cal.App.2d 69 at 81 (1960).

Such a flagrant example of benefiting from one's own wrong (C.C. 3517) should not be countenanced by this court.

V. The Legislature and the Courts Have Made Clear the Department Has a Duty to Preserve at Least Some of the Patient's Estate.

As already noted, section 6655 prohibits the taking of the patient's estate for hospitalization charges if such "payment will reduce his estate to such an extent that he is likely to become a burden on the community in the event of his discharge from the hospital." In order to give the patient this protection without abandoning the taxpayer's claim to reimbursement, an equitable lien is frequently used as in this case. The courts have approved its use and only last year the District Court of Appeal in the *Estate of Mims*, 202 Cal.App.2d 332 (1962) considered a case in which the patient was actually released from the hospital and used his property for the rest of his life subject to [fol. 83] the Department's lien.[4] In protecting the lien from attack by the heirs, Mr. Justice Bray pointed out:

> "The probate court's power to protect the state in its claim for care of the incompetent and at the same time to protect the incompetent by not requiring an immediate disposal of his property to meet the state's claim is a broad one incidental to its jurisdiction." (202 Cal.App.2d at 345.)

To hold that the Department *must* exhaust a patient's assets before asserting the liability of 6650 against the relatives would mean that the *Setzer* and *Mims* cases would

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[4] "The probate court, by its creation of an equitable lien thus did justice both to the incompetent, whose estate was enabled to be preserved during her lifetime, and to the department by making it possible for the department to recover for the taxpayers of California after the death of the incompetent the unpaid charges for her care. It is difficult to imagine a situation in which it would be more appropriate to impose an equitable lien since it serves to protect all parties concerned." *Estate of Setzer*, 192 Cal.App.2d at 642-3.)

be rendered ineffectual because the Department would be forced, in most cases, to impoverish each patient without regard to his or her age, dependents or financial circum-
[fol. 84] stances if it wished to assert any right to reimbursement against other relatives. This is not required by law or public policy.

VI. Private Property Has Not Been Taken Without Just Compensation.

Appellant's last contention, that property has been taken without compensation, demonstrates its own lack of merit by the cases she cites. *Department of Mental Hygiene* v. *McGilvery*, 50 Cal.2d 742 (quoting in part from *State Commission in Lunacy* v. *Eldridge*, 7 Cal.App. 298) pointed out that the hospital services provided were a substantial equivalent to the reimbursement requested. In point of fact the services are given at a much lower rate than are provided by private institutions.

[fol. 85] Conclusion

The opinion of the District Court of Appeal correctly deals with all the facts and principles of law before it. It is in accord with all the authorities.

The Petition for Hearing should be denied.

Respectfully submitted,

STANLEY MOSK, Attorney General of the State of California;

JOHN CARL PORTER, Deputy Attorney General, Attorneys for Respondent.

[fol. 86] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

S. F. 21349

DEPARTMENT OF MENTAL HYGIENE, Plaintiff and Respondent,

v.

EVELYN KIRCHNER, as Administratrix of the Estate of ELLINOR GREEN VANCE, Defendant and Appellant.

OPINION—Filed January 30, 1964

Defendant administratrix appeals from a judgment on the pleadings, in the sum of $7,554.22, entered against her in an action by the Department of Mental Hygiene of the State of California to recover the alleged cost of care, support, maintenance and medical attention supplied to Auguste Schaeche, mother of defendant's intestate, as a committed inmate of a state institution for the mentally ill. As will appear, we have concluded that the statute upon which the judgment is based violates the basic constitutional guaranty of equal protection of the law, and that the judgment should be reversed.

Plaintiff in its complaint alleges in substance that in January 1953 the mother, Mrs. Schaeche, was adjudged [fol. 87] mentally ill[1] and by the court committed to Agnews[2]

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[1] Welfare and Institutions Code section 5040: "'Mentally ill persons' means persons who come within either or both of the following descriptions:

"(a) Who are of such mental condition that they are in need of supervision, treatment, care, or restraint.

"(b) Who are of such mental condition that they are dangerous to themselves or to the person or property of others, and are in need of supervision, treatment, care, or restraint."

[2] Welfare and Institutions Code section 6500: "There are in the State the following state hospitals for the care and treatment of the insane, the mentally ill, and the mentally disordered: . . . 3. Agnews State Hospital near the City of San Jose. . . ."

State Hospital where she had remained under confinement to the date the complaint was filed in April 1961; that the decedent, Ellinor Vance, was Mrs. Schaeche's daughter "and as such was legally responsible" for her committed mother's care and maintenance at Agnews; that pursuant to section 6651[3] of the Welfare and Institutions Code the Director of Mental Hygiene determined the rate for such care and maintenance, and "said charges were made continuously for every month" Mrs. Schaeche was a "patient" at Agnews; [fol. 88] that for the period of August 25, 1956, through August 24, 1960, such charges totaled $7,554.22, none of which had been paid; that the daughter died on August 25, 1960, and in November 1960 plaintiff filed against the daughter's estate its creditor's claim for $7,554.22, which was rejected, and which sum plaintiff now seeks to recover.

Defendant in her answer denies that her intestate, the daughter, "was legally responsible" for the mother's care and maintenance furnished by the state at Agnews "or any other place whatsoever"; denies any indebtedness to plaintiff; and furthermore alleges that the incompetent mother herself owns (in her guardianship estate) some $11,000 in cash, to which resort should first be had before attempt is made by the state to charge her children with the costs of her care. More specifically, defendant directly challenges the right of a state to statutorily impose[4] liability upon,

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[3] Welfare and Institutions Code section 6651: "The rate for the care, support, and maintenance of all mentally ill persons and inebriates at the state hospitals . . . where there is liability to pay . . . shall be reviewed each fiscal year and fixed at the statewide average per capita . . . as determined by the Director of Mental Hygiene. . . ."

[4] *Historical Background*:

At common law there was no liability on a child to support parents, or on parents to support an adult child. (See, e.g., *County of Los Angeles* v. *Frisbie* (1942) 19 Cal.2d 634, 645-646 [11]; *Duffy* v. *Yordi* (1906) 149 Cal. 140, 141-142 ("at common law there was no legal obligation on the part of the child to [support a parent] . . . such obligation depends entirely upon statutory provisions"); *Napa State Hospital* v. *Flaherty* (1901) 134 Cal. 315, 316-317 ("The right to maintain any action against the father for the support of an adult child, if any such right exists, is purely a creation of

and collect from, one adult for the cost of supporting an- [fol. 89] other adult whom the state has committed to one of its hospitals for the mentally ill or insane. Both parties moved for judgment on the pleadings, the court granted plaintiff's motion and denied that of defendant, and from the ensuing judgment defendant appeals.

In support of the judgment plaintiff department relies upon the declaration in section 6650 of the Welfare and Institutions Code that "The husband, wife, father, mother, or *children* of a mentally ill person or inebriate . . . shall be liable for his care, support, and maintenance in a state institution of which he is an inmate. . . ." (Italics added.)

The department, citing *Guardianship of Thrasher* (1951) 105 Cal.App.2d 768, and *Dept. of Mental Hygiene* v. *Black* (1961) 198 Cal.App.2d 627, asserts flatly that the liability purportedly imposed by section 6650 upon the persons therein designated is not only, in the language of the sec- [fol. 90] tion, "a joint and several liability," but is absolute and unconditional, and that "the fact that the patient has assets of her own becomes completely immaterial." In *Thrasher* it was held (pp. 776-778 [3-8] of 105 Cal.App.2d) that the husband of an incompetent committed to a state mental hospital was under the duty to support her therein even though she had estate of her own. That case is of small help to plaintiff here; manifestly, the basic obligation and relevant status of the *husband* arose from the marriage contract to which he was a consenting party and no consideration was given to the question as to whether imposing liability upon one spouse for support of the other in a state institution denies equal protection of the law to the servient spouse. (See also *Estate of Risse* (1957)

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the statute. No such right existed at common law"); 44 C.J.S., p. 175, fn. 79; p. 176, fn. 81; p. 183, fn. 79; 67 C.J.S., pp. 704-705; pp. 727-728, § 24; 39 Am.Jur., pp. 710-712; 41 Am.Jur. pp. 684-687.) We recognize that various states have undertaken from time to time to create an obligation upon children to support indigent parents and upon parents to support indigent adult children; some states have even purported to create and impose a support obligation on brothers and sisters and on grandparents and grandchildren. (See 41 Am.Jur., pp. 684-686, §§ 6-7; 67 C.J.S., p. 705, § 17; id., p. 728, § 24.)

156 Cal.App.2d 412, 421 [7].) However, in *Black* the court held the mother of a mentally ill person to be liable for the cost of the latter's support in a state hospital, with the declaration (p. 632 [2] of 198 Cal.App.2d) that by reason of the provisions of section 6650 there was no merit to the contention "that the personal assets of the incompetent patient must first be exhausted before liability is imposed on responsible relatives." (See also *County of Lake* v. *Forbes* (1941) 42 Cal.App.2d 744, 747 [3, 5], and *Janes* v. *Edwards* (1935) 4 Cal.App.2d 611, 612, involving [fol. 91] other and different statutes.) We proceed to the fundamental issue tendered by the case before us.

Recently in *Department of Mental Hygiene* v. *Hawley* (1963) 59 Cal.2d 247, the department, relying upon this same section 6650, attempted to collect from a father for the cost of care, support and maintenance in a state hospital for the mentally ill or insane of his son who had been charged with crime, but before trial of the criminal issue (and obviously without adjudication of that issue) had been found by the court to be insane and committed to such state hospital. We there held (pp. 255-256 [6]) that "The enactment and administration of laws providing for sequestration and treatment of persons in appropriate state institutions—subject of course, to the constitutional guaranties—who would endanger themselves or others if at large is a proper state function; being so, it follows that the expense of providing, operating and maintaining such institutions should (subject to reasonable exceptions *against the inmate or his estate*) be borne by the state." (Italics added.) We further held that recovery could not constitutionally be had against the father of the committed patient. This holding is dispositive of the issue before us. Whether the commitment is incidental to an alleged violation of a penal statute, [fol. 92] as in *Hawley*, or is essentially a civil commitment as in the instant case, the purposes of confinement and treatment or care in either case encompass the protection of society from the confined person, and his own protection and possible reclamation as a productive member of the body politic. Hence the cost of maintaining the state institution, including provision of adequate care for its

inmates, cannot be arbitrarily charged to one class in the society; such assessment violates the equal protection clause.

Although numerous cases can be cited wherein so-called support statutes have been sustained against various attacks,[5] research has disclosed no case which squarely faced, [fol. 93] considered, discussed and sustained[6] such statutes in the light of the basic question as to equal protection of the law in a case wherein it was sought to impose liability upon one person for the support of another in a state institution. No such constitutional issue appears to have received either consideration or documented resolution in *Dept. of Mental Hygiene* v. *McGilvery* (1958) *supra*, 50 Cal.2d 742 (see pp. 754-761, esp. p. 760 [22] wherein in this respect it is commented merely that "the present claim of unlawful classification may not properly be sustained"); neither is there any mention of either the United States or the California Constitutions in *Department of Mental Hygiene* v. *Shane* (1956) 142 Cal.App.2d Supp. 881, relied on in *McGilvery* with the statement (p. 752 [6] of 50 Cal.2d),

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[5] See, e.g., *State* v. *Bateman* (1922, Kan.) 204 P. 682, 683 [2]; *County of Los Angeles* v. *Frisbie* (1942) *supra*, 19 Cal.2d 634, 645-646 [11]; *Mallatt* v. *Luihn* (1956, Ore.) 294 P.2d 871, 878-880 [3-13]; *Dept. of Mental Hygiene* v. *McGilvery* (1958) 50 Cal.2d 742, 760-761 [23] [24]; (attacks based on asserted lack of procedural due process).

County of Los Angeles v. *Hurlbut* (1941) 44 Cal.App.2d 88, 92-94 [1-5]; *Dept. of Mental Hygiene* v. *McGilvery* (1958) *supra*, 50 Cal.2d 742, 754-760 [11-22] *Mallatt* v. *Luihn* (1956, Ore.) *supra*, 294 P.2d 871, 882 [19-25]; *Kelley* v. *State Board of Social Welfare* (1947) 82 Cal.App.2d 627, 631-632 [2]; (attacks based on certain limited claims of discriminatory classification).

Maricopa County v. *Douglas* (1949, Ariz.) 208 P.2d 646, 649 [8-9] (attacks based on claim of double taxation); *Dept. of Mental Hygiene* v. *McGilvery* (1958) *supra*, 50 Cal.2d 742, 761 [25], and *Mallatt* v. *Luihn* (1956, Ore.) *supra*, 294 P.2d 871, 883-884 [28]; (attacks on ground of taking private property for public use without just compensation).

State v. *Webber* (1955, Ohio) 128 N.E.2d 3, 7 [3], and *State* v. *Troxler* (1930, Ind.) 173 N.E. 321, 323 [4] (constitutional question avoided or not discussed).

[6] Contra, see *Department of Mental Hygiene* v. *Hawley* (1963) *supra*, 59 Cal.2d 247.

"The present case cannot be distinguished from that case." It is axiomatic that cases are not authority for propositions not considered (*McDowell & Craig* v. *City of Santa Fe Springs* (1960) 54 Cal.2d 33, 38 [5]; *Maguire* v. *Hibernia* [fol. 94] *S. & L. Soc.* (1944) 23 Cal.2d 719, 730 [4]), and the *Shane* case obviously does not give substance to *McGilvery* on the subject constitutional issue.

We note that in *Hoeper* v. *Tax Commission* (1931) 284 U.S. 206, family relationship was not found an adequate basis for sustaining a statute under which the state attempted to assess an income tax against the husband measured in part by his wife's separate property income; the court there observed (p. 217), "The State is forbidden to deny due process of law or *the equal protection of the laws* for *any purpose whatsoever.*" (Italics added.) Further, in *Estate of Tetsubumi Yano* (1922) 188 Cal. 645, 656-657 [14], blood relationship was found insufficient to constitute a basis for discrimination against a citizen minor whose father because of his race was (under a then held valid statute) ineligible for citizenship. (See also *Oyama* v. *California* (1948) 332 U.S. 633.) It is established in this state that the mere presence of wealth or lack thereof in an individual citizen cannot be the basis for valid class discrimination (*Dribin* v. *Superior Court* (1951) 37 Cal.2d 345, 348-350[1] [holding that a statute purporting to authorize a divorce from an insane spouse but limiting it to only those who could prove financial responsibility, constituted "arbitrary and unreasonable class discrimination"]) and in the same case (at p. 352 [11]) we declared "It is elementary that 'The insane have always been re- [fol. 95] garded as subject to control on the part of the state, *both for their protection and for the protection of others.*'" (Italics added.)

Lastly, in resolving the issue now before us, we need not blind ourselves to the social evolution which has been developing during the past half century; it has brought expanded recognition of the *parens patriae* principle (see 44 C.J.S. 48, §3; 67 C.J.S. 624; 31 Words & Phrases 99-101) and other social responsibilities, including The California Rehabilitation Center Act (added Stats. 1961, ch. 850, p. 2228) and divers other public welfare programs to which

all citizens are contributing through presumptively duly apportioned taxes. From all of this it appears that former concepts which have been suggested to uphold the imposition of support liability upon a person selected by an administrative agent from classes of relatives designated by the Legislature may well be re-examined. Illustrative of California's acceptance of this principle is the provision of section 6655 of the Welfare and Institutions Code that payment for the care and support of a patient at a state hospital "shall not be exacted . . . if there is likelihood of the patient's recovery or release from the hospital and payment will reduce his estate to such an extent that he is likely to become a burden on the community in the event [fol. 96] of his discharge from the hospital." Thus, the state evidences concern that its committed patient shall not "become a burden on the community in the event of his discharge from the hospital," but at the same time its advocacy[1] of the case at bench would seem to indicate that it cares not at all that relatives of the patient, selected by a department head, be denuded of *their* assets in order to reimburse the state for its maintenance of the patient in a tax supported institution. Section 6650 by its terms imposes absolute liability upon, and does not even purport to vest in, the servient relatives any right of control over, or to recoup from, the assets of the patient. A statute obviously violates the equal protection clause if it selects one particular class of persons for a species of taxation and no rational basis supports such classification. (See *Blumenthal* v. *Board of Medical Examiners* (1962) 57 Cal.2d 228, 237 [13]; *Bilyeu* v. *State Employees' Retirement System* (1962) 58 Cal.2d 618, 623 [2].) Such a concept for the state's taking of a free man's property manifestly denies him equal protection of the law.

Anything found in *Dept. of Mental Hygiene* v. *McGilvery* (1958) *supra*, 50 Cal.2d 742, 754-761 [11-25] or in cases relying thereon (see e.g., *Dept. of Mental Hygiene* v. *Black*

[1] This is not a criticism of the department or its counsel; they are merely performing to the best of their ability the duty purportedly imposed by the statute.

[fol. 97] (1961) *supra*, 198 Cal.App.2d 627, 632 [2]; *Estate of Setzer* (1961) 192 Cal.App.2d 634, 637-638 [1]) contrary to the views herein expressed must be deemed disapproved.

The judgment is reversed and the cause is remanded with directions to enter judgment for defendant.

Schauer, J.

We Concur: Gibson, C.J., Traynor, J., McComb, J., Peters, J. Tobriner, J., Peek, J.

[fol. 98] [File endorsement omitted]

[fol. 99]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S. F. 21349

[Title omitted]

RESPONDENT'S PETITION FOR A REHEARING BY THE SUPREME COURT—Filed February 14, 1964

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Respondent presents this its petition for a rehearing by this Honorable Court after its decision rendered on January 30, 1964. Said opinion appears as Appendix "A" attached to this brief.

Respondent urges that rehearing be granted for the following reasons:

A. The holding of the court that one adult may not be compelled to support another in a state institution was not raised, briefed, argued or in issue, and Respondent should [fol. 100] be allowed to meet this question.

B. "Equal protection" of the law was not denied. In view of its unbroken acceptance for hundreds of years in the common law, its codification by forty-two legislatures, and its acceptance throughout western civilization, family responsibility cannot be said to involve a classification "palpably arbitrary."

C. *Hawley* is not dispositive, since the court there accepts the constitutional differences between civil and criminal commitments and because modern hospitals are for treatment, not incarceration.

D. Department of Mental Hygiene has no power to create hardship for responsible relatives; it is forbidden to do so. Claims of hardship can be tested by judicial review.

E. The economic impact on the state, the counties and private hospitals should be considered before the entire legislative program is invalidated.

F. The Legislature is best equipped to determine whether social evolution calls for free mental hospitalization.

G. The present opinion will result in increased attempts by adult children to commit their senile parents and will thereby result in a breakdown of the sense of family responsibility.

H. Rehearing is needed to clarify the decision: (a) Is not a prospective application of the decision called for; and (b) Is inter-spousal liability eliminated?

[fol. 101]

I. The Holding of the Court That One Adult May Not Be Obligated to Support a Closely Related Adult in a State Mental Hospital Was not in Issue, Was not Briefed or Argued Before This Court and a Rehearing Should Be Granted so That Respondent May Present its Arguments for the Court's Consideration.

The only contention raised by the appellant which resembles an equal protection argument appears on pages 7 and 8 of his Petition for Hearing. Appellant never questioned the basic premise (which is here the gravamen of the court's holding) that one adult can be required to support "persons standing in close relationship" to him. (*Department of Mental Hygiene* v. *McGilvery*, 50 Cal.2d 742, 755 (1958), quoted by appellant on page 7 of his petition.) His *only* contention was that the defendant was "improperly and arbitrarily classified as a person liable under

the scheme of legislation in question" *so long as* the patient had some estate of her own.

Before the District Court of Appeal appellant acknowledged that if there were a "primary obligation" of a daughter to support a mother the defendant would be liable (App. Op. Br. p. 4); but that the daughter's obligation was secondary to the liability of the mother's own estate. He also states his position on page 6 (App. Op. Br.) as:

> "In the *McGilvery* case the incompetent was an adult child; there was a primary duty on the parent to support the child. Here there was no such primary duty, [fol. 102] and we contend that if any liability is to be imposed on the daughter or on her estate, it must be shown that not only the mother had no funds but that the daughter had the ability to pay."

In other words, the sole issue presented was the question of priority. However, the court also states that:

> " . . . defendant directly challenges the right of a state to statutorily impose liability upon, and collect from, one adult for the cost of supporting another adult whom the state has committed to one of its hospitals for the mentally ill or insane." (Opinion, pp. 3-4)

While this correctly states the court's holding, an examination of the briefs will demonstrate this issue was never presented to or properly before the court. In addition, the transcript of the oral argument before the Supreme Court[1] will demonstrate that *nothing* said by defendant's counsel or *raised by questions from the bench* apprised either counsel of that which has become the holding of this court.

Respondent respectfully requests that it be granted a [fol. 103] rehearing to present its arguments[2] for the con-

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[1] Copies of this transcript are being appended hereto.

[2] *Cf. Morgan* v. *United States*, 298 U.S. 468, at 481 (1935), "One who decides must hear."

sideration of the court on a question which has such vital economic and social consequences to the people of the State of California.

II. Section 6650 of the Welfare and Institutions Code Does not Deny Equal Protection of the Laws.

Manifestly, not every classification violates the equal protection of the laws. Only those classifications which are "palpably arbitrary and beyond rational doubt erroneous,"[3] may be struck down as unconstitutional. Here the critical question is whether a classification based on a close family relationship fails for the above reason. [fol. 104] Respondent contends that a classification deemed reasonable throughout Anglo-American jurisprudence and the common law, rigidly enforced by the Roman Law and Civil Law courts, codified by the Legislatures of at least forty-two states, sustained (in civil commitments) by every previous court which has considered it, reaffirmed after detailed and comprehensive examination by this court only five years ago, *cannot* be said to be so "palpably arbitrary" as to deny equal protection of the laws.

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[3] As quoted in *Dribin* v. *Superior Court*, 37 Cal.2d 345, 351 (1951). In *Dribin*, Justice Schauer clearly and succinctly states almost all of the principles by which the reasonableness or arbitrariness of a classification is to be judged.

> "Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute. . . . [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it. [Citations.] The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant. . . . [Citations.] The classification should be reasonable, i.e., have a substantial relation to a legitimate object to be accomplished . . . [I]t is not our concern whether the Legislature has adopted what we think to be the wisest and most suitable means of accomplishing its objects. [Citations.]" 37 Cal.2d at 351-352.

Of course, an attack on the constitutionality of section 6650 must be based on these principles.

A. Reciprocal Duties of Support Between Parents and Adult Children Were Well Established at Common Law.[4]

The principle of charging a parent for the support of an incompetent or indigent child, minor or adult, is not a new concept. Of course, during the very early develop- [fol. 105] ment of the common law the idea of an asylum or hospital for the mentally ill was unknown. Those who behaved strangely were looked upon as curiosities, laughed at or punished and allowed to wander around the community.[5] But the concept that the immediate family had a

[4] It may be argued that the term "common law" includes only decisional law and not statutes passed by Parliament. It would appear however that the common law referred to in section 22.2 of the Civil Code "includes not only the *lex non scripta*, but also the written statutes enacted by Parliament." (*People* v. *One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 287 (1951))—More precisely, those Acts passed by Parliament prior to the separation of the American Colonies from England. *Moore* v. *Purse Seine Net.*, 18 Cal.2d 835, 839 (1941).

That the old English statutes must be considered an integral part of the whole fabric of the common law is confirmed in a somewhat euphuistic definition of the term, found in an 1850 report to the Governor from the Senate Committee on the Judiciary. The report is reprinted in 1 Cal.Ann. 588-604, and at page 592 the following definition is offered:

> "The common law is that system of jurisprudence which deducing its origin from the traditionary customs and simple laws of the Saxons, becoming blended with many of the customs and laws of the Normans, enriched with the most valuable portions of the Civil Law, *modified and enlarged by numerous Acts of the English Parliament*, smoothed in its asperities and moulded into shape by a succession of as learned and wise and sagacious intellects as the world ever saw, has grown up, during the lapse of centuries, under the reformed religion and enlightened philosophy and literature of England, and has come down to us, amended and improved by American legislation, and adapted to the Republican principles and energetic character of the American people." (Emphasis added.) (See also footnote 8, *People* v. *Sidener*, 58 Cal.2d 645, 661 (1962).)

[5] See Appendix "B", discussion by Dr. Walter Rapaport. Appendix "G" also contains an interesting history of the early treatment of the insane.

moral and legal duty to support the indigent and insane was an early part of the development of the common law.

As early as 1601 it was established that under certain conditions such an obligation of support would be imposed [fol. 106] on relatives of close consanguinity. 43 Elizabeth, chapter 2, section 7, states:

> "VII. And be it further enacted, that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter-sessions shall be affected; (2) upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein."

Note that no distinction is made between adult children and minor children, either as to their right to or duty of support.

In 4 Holdsworth's History of English Law 157, the author notes that this statute made parents "liable to maintain their pauper children and children their parents." And at page 397 it is further noted that "parents were made liable to maintain their impotent children and children their impotent parents . . . " "Impotent" is synonymous with "incompetent" and fits into the pattern of establish-[fol. 107] ing a liability for care of those unable to maintain themselves.

Illustrative of the manner in which this old statute was interpreted is the case of *Cole* v. *Brown*, 2 K.B. 301 (1907). In that case the son of an insane woman was required to pay the patient's guardian for the cost of her care in an asylum. The court agreed that liability could be imposed under the Statute of Elizabeth, making no distinction between the obligations of an adult child as against those of a minor child. Moreover, in a concurring opinion it was noted, at page 304, that the liability might not be confined

solely to "lunatics who are paupers and it may be that it applies to a lunatic who was not a pauper . . . "

In the United States those decisions[6] which undertook to trace the development of the liability here concerned found the doctrine had existed in Anglo-American jurisprudence for 360 years, stemming from the Statute of Elizabeth already referred to *supra*, page 8. *People* v. *Hill*, 163 Ill. 186, 46 N.E. 796, 797-8 (1896), found the duty of sup- [fol. 108] port was a principle of natural law and one which was enforced by the courts of the civil law countries.[7] Thus 43 Elizabeth, chapter 2, section 7 was passed to correct this "defect" in the English law and to "transform[ ] the im-

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[6] Footnote 4 of the court's opinion refers to several cases stating that liability for the support of an adult child by a parent and vice versa was unknown at common law. In none of the cases was the history of the proposition traced. In one case (*Duffy* v. *Yordi*, 149 Cal. 140) the court did state the support duty was a statutory invention and not a common law right. However, the fallacy of this reasoning is the erroneous assumption that the term "Common law" does not include statutory Acts of Parliament prior to the separation of the Colonies from England. See *supra*, footnote 4, for documentation of this proposition.

[7] Common law lawyers, who are prone to believe civilization was born during the Grand Assizes, sometimes forget while the law in England was being born a sophisticated and comprehensive system of jurisprudence had existed on the continent for centuries. As mentioned in *People* v. *Hill*, *supra*, reciprocal duties of support between adult children and parents were always enforced in civil law countries. See also 1 Blackstone Commentaries 447-8 (Lewis's Edition, 1902).

Roman law unequivocably imposed a reciprocal duty of support between insane parents and adult children. Thus we find in about 529 A.D. (see 12 The Civil Law (Trans. J.P. Scott) 62) the Code of Justinian, Book I, Extract of Novel 115, Chapter III, stating that children who did not care for their insane parents were disinherited even when a bequest was made by will and the inheritance went to the one who supplied support. Fathers had the same duty to insane adult children and the same penalty applied.

The Bible makes clear a duty to one's parents. Exodus 20:12, 21:17, Leviticus 20:9, Deut. 5:16. Plato's *Republic* also states the family was responsible for caring for the insane. See Appendix "G", p. 8.

perfect moral duty into a statutory and legal liability." See also *Beach* v. *Government of the District of Columbia*, 320 F.2d 790, 792 (1963).

In summary, the support liability here concerned is not one of recent contrivance. It has a long and venerable history in Anglo-American jurisprudence and western civilization.

[fol. 109]

B. The Legislatures of Forty-two States Have Found the Classification Herein ~~to Be~~ Reasonable.

In considering whether the immediate family is a reasonable class to be liable for, within their ability to pay, the cost of medical treatment given in a state institution, it is relevant to consider that forty-two legislatures of this Union, have enacted support laws with almost identical liabilities.[8]

Presumably this process involved thousands of legislators, each presumably sworn to uphold their and the United States Constitution; each legislature presumably held hearings, took evidence as to cost, hospitalization problems and policy;[9] presumably each considered and debated the merits of competing economic, political and social values. Yet *each* arrived at a classification virtually identical to the one at bench. Can it fairly be said that their collective and individual judgments as to reasonableness [fol. 110] of a classification, expressing such a unanimity is nevertheless, "palpably arbitrary and beyond rational doubt erroneous." *Dribin* v. *Superior Court, supra*, 37 Cal.2d, 351.

Respondent respectfully submits that it cannot.

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[8] See Appendix "C" for a collection of statutes. The National Association of Reimbursement Officers states forty-five states impose this liability. However, as of this date we can only verify forty-two. As the court herein observes (Opinion, footnote 4), some states extend the class to grandparents, grandchildren, brothers and sisters. Few have defined a smaller class than is involved here.

[9] For a discussion herein of a few of these problems see *infra*, pages 79-80.

C. Every Previously Reported Decision Has Sustained the Constitutionality of Imposing Liability on the Immediate Family, as a Class, for Civil Commitments Against Attacks on Both Due Process and Equal Protection Grounds.

The most recent case involving the instant problem is *Beach* v. *District of Columbia*, 320 F.2d 790 (1963). A petition for Writ of Certiorari in the United States Supreme Court was denied on December 9, 1963.

Section 21-318 of the District of Columbia Code contains a provision virtually identical to Welfare and Institutions Code section 6650 making liable the immediate family of a mentally ill person for the cost of care of such person in a District institution.[10]

In the *Beach* case the patient's incapacity and commit- [fol. 111] ment arose after she had attained her majority. The District of Columbia attempted to hold liable the father of the woman for a portion of the costs involved in maintaining her. Judgment was entered in favor of the District, from which the father appealed.

In its opinion the Federal Circuit Court, at page 792, states the main issue: "Appellant's basic challenge to the judgment is that it deprives him of his property without due process of law."

The court discussed the long history of this liability, early recognized in England.

The court then proceeded to enunciate, in clear and concise language, the reasons why the imposition of such liability cannot be deemed arbitrary or unreasonable (page 793):

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[10] Section 21-318 Liability of relatives for costs of maintenance and treatment.

"The father, mother, husband, wife, and adult children of an insane person, if of sufficient ability, and the committee or guardian of his or her person and estate, if his or her estate is sufficient for the purpose, shall pay the cost to the District of Columbia of his or her maintenance, including treatment in Saint Elizabeths Hospital or in any other hospital to which the insane person may be committed. . . ."

> " . . . [W]hen the law turns also to the father for help, if he is able to give it, when the estate of the incompetent is insufficient, it does so only to supplement the public responsibility. Placing a secondary obligation upon the father finds its validity in the reasonableness of attaching legal significance to the natural bonds of consanguinity. *It is not unreasonable,* it is *not a denial of due process,* for the law to *attach an enforceable obligation to the moral obliga-*
> [fol. 112] *tion* which exists in the usual family relationship of father and daughter. Recognition by Statute of this obligation is not at odds with recognition that the public in many cases is called upon to supply total support for such individuals, whose faculties or estates are unable to do so." (Emphasis added.)

The judgment holding the father liable was affirmed.

Although couched in terms of the "reasonableness" of requiring a father to support his adult daughter, the holding of *Beach* is based on the due process clause since the equal protection clause does not, by its terms, apply to the federal government. It is submitted, however, that *Bolling* v. *Sharpe,* 347 U.S. 497 (1954),[11] also a District of Columbia case, demonstrates the reasoning in *Beach* does come to bear upon the instant problem.

Brushing aside any technical distinction between equal protection and due process, the United States Supreme Court, at page 499, observed that, while equal protection may be a more explicit safeguard than due process and hence not always interchangeable with it, "the concepts [fol. 113] of equal protection and due process, *both stemming from our American ideal of fairness,* are not mutually exclusive." (Emphasis added.) *Cf. Detroit Bank* v. *United States,* 317 U.S. 329, 337-338 (1943); *Currin* v. *Wallace,* 306 U.S. 1, 13-14 (1938). The court then proceeded to strike down racial discrimination in the District of Columbia under the same basic rationale it used in *Brown* under equal protection.

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[11] This was a companion case to *Brown* v. *Board of Education,* 347 U.S. 483 (1954) decided the same day, which used the equal protection clause to invalidate racial segregation in the states.

Hence it is appropriate to refer to both equal protection cases and to cases where "due process" objections were made and rejected. Without exception, support statutes involving classifications virtually identical to that here in issue were sustained as being neither arbitrary nor unreasonable. See *People* v. *Hill,* 163 Ill. 186, 46 N.E. 796, 37 L.R.A. 634 (1896); *State* v. *Bateman,* 110 Kan. 546, 204 P. 682 (1922); *In re Idleman,* 146 Ore. 13, 27 P.2d 305 (1933); *State* v. *Thurston County,* 199 Wash. 398, 92 P.2d 234 (1939); *Commonwealth* v. *Zommick,* 362 Pa. 299, 66 Atl. 2d 237 (1949); *Kough* v. *Hoehler,* 413 Ill. 409, 103 N.E. 2d 177 (1956); *State* v. *Webber,* 163 Ohio St. 598, 128 N.E. 2d 3 (1955).

An equal protection argument was also made and rejected in *Kough* v. *Hoehler, supra.* Although the holding in that case was to the effect that a classification based on civil [fol. 114] versus criminal commitment was not unreasonable,[12] it has since been cited as more general authority on the question of whether the particular support statute denied equal protection (See *Department of Public Welfare* v. *Haas,* 15 Ill. 2d 204, 154 N.E.2d 265, 271 (1958)).

Perhaps the most succinct summary of the attitude of the courts in the several states is found in a California case, *State Commission in Lunacy* v. *Eldridge,* 7 Cal.App. 298, 304 (1908):

> "And, as to the proposition of the alleged unequal burden imposed upon one class, thus, as contended, discriminating in favor of another upon whom the burden is not cast, the answer is, we think, that the so-called unequal burden is only one springing from a natural duty which, as to its performance, the legislature has recognized by positive enactment. (Civ. Code, §§ 38, 206.)"

[12] See discussion of this holding as it relates to *Department of Mental Hygiene* v. *Hawley,* 59 Cal.2d 247, 255 (1963), *infra,* p. 19.

D. *McGilvery* Considered at Length Whether Equal Protection Was Denied by Virtue of an Improper Classification.

The court states in its opinion at page 8 that it had in *McGilvery* "commented merely that the present claim of [fol. 115] unlawful classification may not be properly sustained." This characterization hardly does justice to an opinion which states:

> "A rehearing was ordered to consider the contention of the defendant, first elaborated upon in the petition for rehearing, that the provisions of [this law] . . . [result in] a deprivation of property without equal protection of law, and without just compensation in violation of the state and federal Constitutions." (50 Cal.2d 742)

This court then considered the equal protection argument for thirteen pages (pp. 747-760). Such detailed consideration can hardly be said to be a "mere comment."

Also at page 8 the court states:

> "No such constitutional issue [that is, can liability for one person be imposed on another for support in a state institution] appears to have received consideration . . . in *Department of Mental Hygiene* v. *McGilvery* . . ."

Such an avoidance of *McGilvery's* significance and precedent value hardly seems permissible in view of the strong dissent covering exactly[13] what the court states is here [fol. 116] being raised for the first time. (Opinion pp. 7-8.)

III. *Hawiey* Offers No Support for the Holding Here.

The court has held that "the cost of maintaining the state [mental] institution, including provision for its sup-

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[13] "Particularly do I believe that there is a serious question of the constitutional right of the Legislature to impose liability for the maintenance of an adult person upon any other person who has not voluntarily (as in the case of marriage, for example) assumed an obligation to answer for such support. . . ." (50 Cal.2d 766.)

port cannot be arbitrarily charged to one class [the immediate family] in society; such assessment violates the equal protection clause." (Opinion, p. 7.)

This conclusion is reached first by reasoning that *Department of Mental Hygiene* v. *Hawley,* 59 Cal.2d 247 (1963), "is dispositive of the issue before us." (Opinion, p. 6.) Second, it is said that the commitment is primarily for the *protection* of society and the patient and thus the cost of such protection is society's obligation. (Opinion, p. 7.)

Respondent submits that *Hawley* does not compel the holding here, and the reasons for civil as opposed to criminal commitments are so diverse as to offer no constitutional parallels. In addition, the emphasis on "protection of society" in the opinion is supported neither by case law nor modern psychiatry, both of which emphasize that [fol. 117] modern state hospitals are primarily, indeed almost exclusively, places of *treatment* for mental diseases, not institutions of *incarceration.* Moreover, the fact that some benefit to the public accrues from the use of state hospitals, is not inconsistent with *individual* responsibility for those who receive the benefits, including the family.

A. Constitutional Differences Separate Commitments Merely for Insanity and Those Involving a Criminal Charge.

In *Kough* v. *Hoehler, supra,* 413 Ill. 409, 109 N.E.2d 177 (1952), the defendants argued, as the court implies here, that there is no constitutional difference, insofar as equal protection is concerned, between liability for the family of one committed civilly and that of the family of one in custody due to a pending criminal charge. The court rejected that contention stating:

> "We cannot agree with plaintiff's reasoning that there is no valid basis for making a distinction between *persons who are in the hospital merely for treatment and those who are imprisoned on account of some criminal charge* or offense and who, if they were in physical and mental health, would be in the jails or

penitentiaries. We think there is a clear basis for distinction. Inmates against whom there are *no criminal charges,* or who have been guilty of no criminal [fol. 118] offenses, *are in the hospital solely for treatment.* Those who are charged with crime, or who have been convicted of crime, would ordinarily be in the jail or penitentiary, but on account of the fact that there are no facilities there for treating them for their physical and mental ills they are transferred to the hospitals. Moreover, the public is vitally and directly interested in those who are in custody. They are in custody initially for the protection of the public, when convicted or accused of a crime. They do not cease to be of intimate consideration to the public merely because they are, or become, insane, nor do they cease to be in custody for the same reason. *Those patients in the State hospitals for the purpose of treatment alone are of direct and vital interest only to their relatives and friends.* It is true that the public has an indirect moral interest in their care and well being, but they are of direct consideration only to their close friends and relatives. It was a valid exercise of the discretion vested in the legislature to make a distinction between criminal patients and those who are not criminal." (Emphasis added.) 109 N.E.2d, 181

[fol. 119] In other words, the Illinois Supreme Court found a constitutional difference in whether the relative's liability was incident to a civil commitment or connected with a criminal charge.

Only last year the very distinction swept aside now by this court (Opinion, pp. 6-7), was thought to be meaningful when it said:

"Thus here, equally as in *Brock,* the committed person is held in the state institution not merely because he is (or was) *insane* but because the state, in a proceeding instituted by it, has accused him of crime and *his detention is found to* be necessary for the protection of the public. . . ." *Department of Mental Hygiene*

v. *Hawley*, 59 Cal.2d 247, 255 (1963). (Emphasis by the Court.)[14]

Moreover, the ancient tradition of liability of the family for the aged and insane as expressed in[15] the Common Law, the Civil Law, the Torah, the Bible, The Republic and the Justinian Code, bearing as it does on the reasonableness of this classification, is almost totally absent where the criminally insane are concerned.

[fol. 120] Respondent submits that *Hawley* is not "dispositive" here and the distinction made there and discussed above would uphold the constitutionality of relative liability for civil commitments.

B. The Principal Purpose of the State Hospitals Is Not "Custodial" But Is to Provide Treatment for the Sick

No statute or legislative history is given or evidence referred to by the court to support its assumption that the primary purpose of the state institutions is for confinement of inmates or "for their protection and for the protection of others" (Opinion, pp. 9-10). The court's quote to this effect, attributed to *Dribin* v. *Superior Court*, 37 Cal.2d 345, 352 (1951), is actually a quote therein from 14 Cal. Jur. 341-342, section 6. This secondary authority was published in 1924 at a time when, Dr. Walter Rapaport states:[16]

> ". . . early in the twentieth century, while there was no feeling that the insane were sick, yet there was a genuine movement toward more humane and kindly care, and the institutions continued to be primarily *custodial* in nature." (Emphasis added.)

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[14] Note the striking similarity in reasoning and language between what is said here and the first italicized portion of the Illinois Supreme Court's opinion in *Kough*, quoted, *supra*.

[15] See *supra*, pages 6-10.

[16] See Appendix "B", letter of Dr. Walter Rapaport, page one. For the appropriateness of such letter here, see *Pearson* v. *Social Welfare*, 54 Cal.2d 184, 210-11 (1960).

[fol. 121] This view followed a period during which the *custodial* or protection view prevailed. Of this period Dr. Rapaport says:

> "Some considered the manifestations of the so-called insane person to be related to sinfulness, some to criminality, and in some instances the insane person was pictured to be related to God or some other power for good or for evil. Thus it is easy to understand why there was a public demand that this type of person be isolated from society on the basis of the majority feeling that they were a danger and a menace." (Ibid.)

Modern psychiatrists view the concept that the mentally ill are by and large dangerous as little more than a layman's superstition. Dr. Rapaport says:

> "With the trend away from custody toward treatment, there has also developed the realization that by and large the mentally ill cannot be considered as dangerous to society. It has been established by scientific studies that people who have been in our hospitals or who are in our hospitals, commit less crimes of violence when compared to the general population than do those who have not been in our hospitals or are [fol. 122] not in our hospitals, and so the traditional concept that the mentally ill must be isolated and secluded in hospitals for the protection of society must be re-examined, and when it is carefully and thoroughly re-examined, I am sure that it will be concluded that we are no longer justified in retaining that concept." (Appendix "B", pp. 2-3.)

Dr. Rapaport further indicates (Ibid.) that barred windows and locked doors are, but for a handful of patients and those at Atascadero, a thing of a past age, as illustrated by Appendix "D." [17]

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[17] In Appendix "D" there is a picture of a hospital built during a time when it was thought that state hospitals were primarily for the protection of society and the patient himself. Observe how anachronistic architecture derived from such thinking seems today.

Jurists as well as doctors share Dr. Rapaport's contempt for the concept of the "dangerous lunatic." [18]

Lloyd S. Nix, Judge of the Superior Court, Psychiatric Department, of Los Angeles, says:[19]

> "Society has an underlying fear and misunderstanding of mental illness despite medical progress and [fol. 123] efforts at public education. . . . This influences not only the manner in which problems are presented to the court, but injects an element of emergency and danger even in cases where the person, although considered to be ill and in need of care, is not dangerous to himself or others."

Even the generally accepted conclusion that by and large patients are "committed" by court order against their will is outmoded. Voluntary admissions and certification by the health officer are attempted first and formal commitment is, in enlightened communities, merely a last resort.[20]

That the *primary* purpose of the state hospitals was to provide treatment was recognized at an early time by the California courts. In *State Commission in Lunacy* v. *Eldridge*, 7 Cal.App. 298 (1908) (Hearing denied by Supreme Court), the relatives argued that because of the public responsibility and consequent public benefit:

> ". . . it amounts to a species of double taxation[21] to require individuals who have relatives in said hos-

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[18] So characterized by the dissent in *Eldridge* and quoted in the dissent in *McGilvery*, at 768.

[19] See Nix, Recent Procedural Revisions in the Psychiatric Department, Superior Court of Los Angeles County, 34 L.A. Bar. Bull. 291 at 292 (1959).

[20] Nix, Op.Cit., at 292, 293, 309.

[21] The court herein states that the department's charges are a species of taxation (Opinion, p. 11). Such a contention has been repudiated by every court which has previously considered it, including *Eldridge* quoted above.

Estate of Yturburru, 134 Cal. 567, 569 (1901):

> "It is not double taxation, nor taxation at all."

In re Idleman's Commitment (Ore.), 27 P.2d 305, 310 (1933):

> "The sum exacted by this statute is not a tax but is mere payment for a service rendered by the state institutions."

Accord.: *State* v. *Bateman* (Kan.), 204 Pac. 682, 683 (1922).

> [fol. 124] pitals to pay for or contribute to their support. This position proceeds, we are inclined to think from a *misconception* of the *real, paramount purpose* intended primarily by the legislature to be achieved by the establishment of state institutions for the care and maintenance of the insane. Of course, one of the purposes is no doubt to protect the citizens against the violent acts of such insane people as may be dangerous, and who, if at large, would likely be a menace to the lives, persons and property of the citizens. *But the principal purpose was and is to care for indigent insane, who in some cases may be successfully treated for the malady.* . . . The liability for their support [fol. 125] rests, as we have seen, upon a legal as well as natural duty, and their forcible detention *inures as much to their benefit and to that of relatives* obliged to contribute toward their care and support as to the state." (Emphasis added.) 7 Cal.App., 304-305.

So even a half century before it was accepted that mental illness cannot be equated with dangerous tendencies, one California court was prescient enough to grasp the real purpose and function of the state mental hospitals.

Certainly the court is correct in stating that some benefit accrues to the public from the incarceration of that handful of actually dangerous persons and from the "reclamation [of the person] as a productive member of society." (Opinion, p. 7.)

But the premise that mental hospitals are primarily for the public benefit and therefore the public should pay is fallacious. These hospitals treat the mentally ill with a view to effecting a medical cure. The primary beneficiary is the patient and his family. Thus it is not unreasonable to ask the immediate family to share the burden, if able.

Doubtless this is what the Circuit Court of Appeals had in mind in *Beach* v. *Government District Columbia*, 320 [fol. 126] F.2d 790, 793 (1963), *supra*, when it declared that public responsibility is not incompatible with private liability of specified family members.

A similar attitude was expressed by the Supreme Court of Oregon, which stated:

> "It is evident that both the incompetent and his immediate relatives receive a very valuable service from the state . . . [T]he contributions made by the taxpayers *are for the benefit of the public,* while the sum paid in support of any particular inmate by himself or his relatives is for his personal benefit (Citations). The sum exacted by this statute is not a tax, but is mere payment for a service rendered by the state institutions." (Emphasis added.) *In re Idleman's Commitment,* (Ore.) 27 P.2d 305, 310 (1933).

This court, only five years ago, said much the same thing:

> "From time immemorial it has been the natural primary obligation of the parent to bear the financial burden of caring for an afflicted child. [In this case an adult.] In this humanitarian age the *state has assumed that obligation* in the *absence* of the *parent's* [fol. 127] *ability* to do so. This fact has not, however, entirely abolished the parental obligation. It has done so only to the extent provided by statute." *Department of Mental Hygiene* v. *McGilvery,* 60 Cal.2d 742, 753 1958). (Emphasis added.)

The finding of a benefit to society is not incompatible with individual liability. Streets can be paved over the protest of an abutting property owner. The public benefit and purpose may be clear, yet a charge can be assessed against those benefiting individually. Every fire regulation benefits the public, but the cost of compliance can be thrust on the property owner even if the cost is undoubtedly an economic hardship.

Hence, a modern concept of treating the mentally ill bolsters the reasonableness of retaining a time-honored obligation.

[fol. 128]

IV. The Department Has No Power to Create Economic Hardships for Either Patient or Relatives

Respondent has never contended and has consistently disavowed any power or right to "denude [the relatives]

of their assets in order to reimburse the state" (Opinion, page 11) in view of the express statement of section 6651 that ability to pay is the criterion for liability. The court must presume in absence of attack that the standards used by the Department in judging financial responsibility are reasonable. *McGilvery*, 50 Cal.2d at 760-1. Moreover, there is an additional safeguard. As this court made clear in *McGilvery, supra*, at 760-761, if the Department refused to cancel liability on a showing of the proper facts of inability to pay, such arbitrary action would be reversed by the courts.

Moreover, it must be remembered that the defendant is the estate of a deceased person and it is difficult to understand how such a person could be "denuded of his assets in order to reimburse the state." (Opinion, page 11) Insofar as the State's claim is viewed as being in opposition to the interests of the heirs, there is no apparent reason why the State as a creditor should have its rights considered inferior to those of other creditors who would be paid before the residue is distributed.[22] The court states that rela- [fol. 129] tives who contribute to the patient's care have no right to recoup anything, presumably under any circumstances, from the assets of the patient. However, section 6650 expressly imposes a *joint and several* obligation and the law is very clear that there is a right to contribution of one joint and several obligor against another. (Civil Code § 1432)[23]

This rule of law has also been applied to situations where one relative paid for the support of an indigent parent and the other obligors, i.e., relatives, were also required to contribute[24] on this joint and several obligation. *Manthey*

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[22] It must be remembered that here the administratrix is the sole beneficiary of the estate and also the guardian of the patient (Petition, pp. 3 & 4; C.T. 24). She will take the entire estate (after a $100 bequest) if she can compel payment from her ward's assets.

[23] *Garcia* v. *Sup. Ct.*, 45 Cal.App.2d 31 (1941) is not *contra* because the liability was *several* only. The obligation under § 6650 is expressly joint and several and section 1432 of the Civil Code necessarily applies by its very terms.

[24] Of course, reading sections 6650 and 6655 together, one would have to conclude that the right of the joint and several obligors to

v. *Schueler*, 126 Minn. 87, 147 N.W. 824 (1914); *Wood* v. *Wheat*, 226 Ky. 762, 11 S.W.2d 916, 918 (1928). *See Mallatt* v. *Luihn*, 206 Or. 678, 294 P.2d 871, 882 (1956), stating contribution could be forced. See cases at 41 Am. Jur. [fol. 130] 689, Poor and Poor Laws, section 12. There is no reason why a recoupment or joinder against the estate of the patient could not be made on the same theory subject to the qualification in footnote 24. It is significant that no *joinder* was ever attempted here; rather we have the flat assertion that the Department could not sue anyone at all until it had impoverished the patient.

In a case where no attempt was made at collection while the decedent was alive, such language seems unjustified. Should a case arise in which a relative has been so "denuded" the courts can and should strike down such arbitrary action.

It is submitted, however, that the above demonstrates this could not arise, since: (1) the statute (section 6651) denies the Department the power to create economic hardships; (2) *McGilvery* says the agency's actions are subject to review for arbitrariness; (3) the Department disclaims any desire or power to impoverish any patient or relative; (4) in this case neither the appellant claims nor does the record support any showing that any persons have been "denuded of their assets." Why should the court presume otherwise absent a showing that the above prem- [fol. 131] ises are unfounded?

V. The Social Question of Free Mental Hospitals Is for the Legislature to Resolve; the Court Should Limit Itself to the Legal Question of Reasonable Classification

Respondent is aware of the fact that "the social evolution which has been developing during the past half century" (Opinion, page 10) may have convinced many forward-looking and intelligent people that an "expanded rec-

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obtain contributions from the patient would be tempered by the admonition of section 6655 that the patient must not be stripped of all his assets so as to leave him a burden upon society. The contributing relatives would have no greater right to impoverish the patient than would the Department of Mental Hygiene.

ognition of the *parens patriae* principle" (Ibid.) presages a time when the state will provide to all citizens medical treatment for both physical and mental ills. Equally intelligent people have opposite opinions. But when the social issue is put aside and only the legal issue of reasonable classification is examined quite different criteria must be utilized. Respondent submits that fairminded persons would agree that the equal protection clause does not *require* free hospitalization for mental illness any more than it.

> "enact[s] Herbert Spencer's Social Statics . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opin- [fol. 132] ions natural and familiar or novel and even shocking ought not to conclude our judgment [on the constitutional question]." Justice Holmes dissenting in *Lochner* v. *N.Y.*, 198 U.S. 45, 75-76 (1905).

Indeed, equal protection is not denied

> "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." (Holmes dissent, *ibid.*)

In the instant case this means that irrespective of the court's opinion in regard to the desirability of providing free care for the mentally ill, the only question the court may properly examine is the legal one involving reasonableness of a particular classification.

VI. Policy Considerations.

Several policy considerations[25] should be considered by the court as bearing upon the question of whether the

[25] Many of these policy considerations the court may feel should properly be directed to the Legislature rather than to the court. But because of the serious doubt whether there is any area left within which the Legislature can act, the respondent feels it must

[fol. 133] entire relative responsibility must be declared unconstitutional.

A. Problems of Dealing With the Indigent Aged

First, many of the patients the Department of Mental Hygiene is caring for are not actually mentally ill, but merely senile. Their problems are associated more with old age than with mental illness. For years the efforts of the Department have been directed toward discharging these people and preventing their initial commitment or voluntary admission, usually accomplished at the instigation of relatives. The Department has found that many children, from inconvenience or ingratitude, simply wish to "dump" their old and senile parents in the state hospitals, an expedient alternative to having them linger around the house, making demands, needing constant care and attention, and often causing social embarrassment. Previously the financial implications of committing a parent had some deterrent effect upon a family's decision to commit a senile parent. The court's decision making state hospitals *free* for most patients sweeps away the last barrier to using the hospitals as a dumping ground.[26]
[fol. 134] The precise additional economic burden this will impose on the Department of Mental Hygiene and ultimately the taxpayers is difficult to assess, but it will undoubtedly be very great.

B. Economic Impact.

1. State and Local Government.

All of the aspects of the economic impact of this court's decision cannot be quickly documented. Appendix "C"

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bring these problems to the court's attention as being relevant to the question of whether the *entire* relative responsibility law is unconstitutional or whether a narrower holding would still allow the Legislature to consider corrective action.

[26] The Deputy Director of Hospital Services for the Department of Mental Hygiene "anticipate[s] a trend in the direction of increased admissions, increased readmissions and decreased releases because the economic advantages will outweigh the social and psychological responsibility." See Appendix page 3.

shows that the immediate revenue loss could be as high as $6,000,000 a year depending upon the actual scope of the court's decision. Depending upon the court's view as to whether the decision is retroactive, many millions of dollars must be repaid by the state as being collected on an unconstitutional theory of liability. The expected increase in commitments of merely senile people has already been commented upon in the discussion of the expected need of additional hospital facilities. The expected influx of those from private mental sanitariums is discussed *infra*.

The financial difficulties this decision will cause the 58 counties of the state are also manifold. As an example, section 2576 of the Welfare and Institutions Code imposes liability on the spouse and adult children of the recipient for all county aid including the costs of county hospitalization. Some or all of this liability on the spouse and adult [fol. 135] children of the recipient for all county aid including the costs of county hospitalization. Some or all of this liability is now eliminated.

A rehearing ought to be granted simply to allow the counties to present fully prepared and documented briefs for the Court's consideration on how local governments will be affected. They too deserve their day in court, for which last minute amici curiae briefs are poor substitutes.

2. Private Hospitals and Homes for the Aged.

There can be no doubt the effect on private mental hospitals is going to be a serious one. This is a several-million-dollar business in California, and the only reasonable result of the court's holding here is that if state hospitals are free[27] most people will withdraw their relatives from the expensive private mental sanitariums and place them in free institutions. Likewise, adult children who are now caring for their parents at home, or financially supporting

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[27] Dr. Rapaport (Appendix B, page 2) points out the high quality of the state hospitals attract many persons whose relatives are well able to pay for private care and who are pleased to pay the state's reasonable charge. But it would be ignoring human nature to expect them to pay when the service is free.

them in homes for the aged can be expected to place them [fol. 136] in the very competent (and free) hands of the state.[28]

C. The Effect of This Decision Upon a Sense of Family Responsibility

As a social question[29] many authorities have argued that part of the increase in crime and juvenile delinquency and other problems of modern society stem from the changing notions of family responsibility and of one member for the other. The court's holding that the members of the family may not be required to pay sums well within their means for the hospitalization care of each other further undermines this bond of family responsibility.

It is an oversimplification to point out that there is no *necessary* connection between the admonition of "Honor thy father and thy mother" (Exodus, 20:12) and the legal liability to pay hospitalization costs for one's parents. Law can be the *leader* in establishing the direction in which moral principles develop. This rationale is, at least in part, a justification for the current legal pressure in the race [fol. 137] relations area.[30] It must be remembered that the original concept advanced to uphold the imposition of this liability was the *moral obligation* of support which was "perfected" into a legal obligation. *State Comm.* v. *Eldridge*, 7 Cal.App. 298, at 304, 305 (1908); *Beach* v. *Govt. of Dist. of Col.*, 320 F. 2d 790, at 792 (1963); *People* v. *Hill*, (Ill.) 46 N.E. 796 at 798 (1896), and cases cited *supra*.

It follows, therefore, the elimination of this legal liability will *tend* to undermine a sense of family responsibility.

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[28] See Appendix F, page 2.

[29] For the appropriateness of such a consideration see Opinion, page 10.

[30] See *Greenberg, Race Relations and American Law*, chapter 1, "The Capacity of Law to Affect Race Relations," 1959.

VII. Rehearing Should Be Granted to Clarify Questions Resulting From the Court's Decision.

Rehearing should be granted in order that the court may modify its opinion to include clarification of the following:

1. Is the instant decision to apply retroactively or prospectively only?

Respondent urges the court to adopt a prospective application. The court has the power to do so; its decision in this respect "turns on considerations of fairness and public policy." (*Forster Shipbuilding Co.* v. *County of Los Angeles*, 54 Cal.2d 450, 459 (1960); cf. *Griffin* v. *Illinois*, 351 U.S. 12 (1955) [concurring opinion of Justice Frankfurter].) It is submitted that a prospective application [fol. 138] would best serve the public in that, (1) the taxpayers would be saved the expense resulting from a deluge of litigation for refunds; (2) the public would be saved the incalculable number of man-hours involved in re-examining old records and accounts.

2. Does the decision eliminate inter-spousal liability under section 6650?

This problem, although adverted to in the court's opinion (See Opinion, p. 5) is left unresolved. Since liability of a spouse can be laid on a ground independent and exclusive of constitutional considerations, i.e., the marriage contract (cf. Opinion, p. 5; see also dissent of Justice Schauer, *Dept. of Mental Hygiene* v. *McGilvery*, 50 Cal.2d 742, 766), it would appear that such liability may justifiably be preserved.

Conclusion

Respondent submits that there are sound and compelling reasons why the instant statute should be upheld. An examination of the *legal* considerations leaves no doubt that within the meaning of equal protection, the classification here is reasonable. Respondent has not been afforded an opportunity to urge its position, and in all fairness it should now be permitted to confront the court and to present argument on a question of such great moment. In light

of changing attitudes respecting mental health, in light of the great economic and social impact of the court's deci-
[fol. 139] sion, and finally, in light of our long history of recognizing obligations such as here involved, a rehearing should be granted.

Dated: February 14, 1964.

Stanley Mosk, Attorney General of California; Harold B. Haas, Assistant Attorney General; Elizabeth Palmer, Deputy Attorney General; John Carl Porter, Deputy Attorney General; Asher Rubin, Deputy Attorney General, Attorneys for Respondent.

[fol. 140]

APPENDIX A TO RESPONDENT'S PETITION FOR REHEARING

OPINION OF SUPREME COURT OF CALIFORNIA IN *DEPARTMENT OF MENTAL HYGIENE* V. *KIRCHNER*, FILED JANUARY 30, 1964—

(printed at p. 52, *supra*).

[fol. 141]

APPENDIX B TO RESPONDENT'S PETITION FOR REHEARING

[fol. 142]

STATE OF CALIFORNIA

MEMORANDUM

Date : February 6, 1964
File No.:

To : Hon. Stanley Mosk, Attorney General
State Building
San Francisco, California

Atten : John Porter, Deputy Attorney General

From : Agnews State Hospital
San Jose

Subject: Activity Status of State Hospitals for the Mentally Ill and Mentally Retarded

Historically the operation of state hospitals has been considered as an essential function of government. This determination was consistent with the knowledge and thinking concerning the mentally ill as it prevailed many, many years ago. Nothing was then known concerning the causes of mental illness and in fact there was no belief that these conditions, then known as insanity, were illnesses at all. Some considered the manifestations of the so-called insane person to be related to sinfulness, some to criminality, and in some instances the insane person was pictured to be related to God or some other power for good or for evil. Thus it is easy to understand why there was a public demand that this type of person be isolated from society on the basis of the majority feeling that they were a danger and a menace.

The asylums created for these people were of crude but secure structure and largely manned by robust, active personnel who could better guarantee security. To these institutions mostly went the indigent, the friendless, and they went to the institution destined to spend the rest of

their lives in custody. The matter of treatment was not an essence because the condition was not considered to be due to any medical origin. As time went on, and especially late in the nineteenth century and early in the twentieth century, while there was no feeling that the insane were sick, yet there was a genuine movement toward more humane and kindly care, and the institutions continued to be primary custodial in nature. Gradually there entered into the picture some opinions that the causes of the conditions, at least in some cases, were medical. Soon the association of general paralysis of the insane with syphilis was recognized, and treatment instituted and a preventative program developed. Other conditions were recognized as being due to dietary disturbances and corrections of these conditions were instituted and the institutions developed a trend toward becoming hospitals rather than custodial asylums.

Over the centuries there were a few voices continuously raised indicating a belief that the insane were sick people, but it wasn't until the twentieth century that any organized activity appeared in support of a medical thesis. After World War I there appeared to be an upsurge of general interest, and especially medical interest, in the psychiatric conditions with the growing realization that they were medical in nature, but this became very pronounced just about the time of the onset of World War II or just prior to it. Psychiatry became a respectable branch of medicine, research into the causes of mental illness became activated, and for the most part throughout the world and notably [fol. 143] in California, there was general recognition of the fact that we have here a medical and a treatable problem rather than purely a custodial problem, and thus a treatment philosophy was substituted for the custodial philosophy. Up to that time persons with financial means would not come to a state hospital for the mentally ill excepting, in some few cases, in the terminal part of their illness. They preferred and did go to private facilities. As the treatment program became more and more activated, the prejudice against the state hospital lessened, and especially in the last two decades more and more finan-

cially independent people sought care and treatment in our public hospitals. Their confidence in our treatment program is supported by the fact that for the last ten years there has been a continuing reduction in the over-all population of our state operated psychiatric hospitals. This in spite of the fact that the over-all general population has continually increased to the number of ten or eleven hundred a day and the admissions to our state hospitals for the mentally ill have continually increased and our death rate remains relatively low and amongst the lowest when compared to other states. During this last ten years there has been a marked increase in the numbers as well as the competency of the staffing of our hospitals and clinics. Two institutes have been put into operation, the first being started just before World War I began and the second somewhat later. These neuropsychiatric institutes, one associated with the medical school of the University of California in San Francisco and one with the University of California medical school at Los Angeles, are actively engaged in research and treatment as well as education and training of psychiatrically minded individuals. An excellent and very active research program operates in our Department of Mental Hygiene, and our patients receive as good care and treatment as is to be found in the best private facilities.

Thus it is no surprise that many persons so financially fixed that they could afford to go to the best private institutions, costing four or five times as much as the maximum rates charged by the State for care in a public institution, and who theretofore went to these private institutions and shunned the public institutions, now for the last fifteen to twenty years have, in ever-increasing numbers, come to the state hospital for treatment. They have found, after experience in private institutions, that, in their case, frequently better results were obtained, insofar as improvement and recovery is concerned at the public institution, than they experienced in the private institution. In all fairness it must be stated that the reverse has also proven true in some cases, and persons who apparently did not do so well in the public institution did better when placed in

a private institution where they also received excellent treatment.

The releases from our public hospitals operated by the Department of Mental Hygiene compare favorably with those of any other part of the country and I do not believe there is any question but this excellent release picture is due to the improved and ever-improving treatment program afforded in our state hospitals. It should be mentioned here that the care and treatment provided is not dependent on whether or not a person pays or how much they pay for their care. In my own experience the majority of people who do pay are willing and anxious to pay for the type of care and treatment afforded at our state hospitals.

With the trend away from custody toward treatment, there has also developed the realization that by and large the mentally ill cannot be considered as dangerous to society. It has been established by scientific studies that people who [fol. 144] have been in our hospitals or who are in our hospitals, commit less crimes of violence when compared to the general population than do those who have not been in our hospitals or are not in our hospitals, and so the traditional concept that the mentally ill must be isolated and secluded in hospitals for the protection of society must be re-examined, and when it is carefully and thoroughly re-examined, I am sure that it will be concluded that we are no longer justified in retaining that concept.

Also, with this change in trend from custody to treatment, there has been a decided change in the construction of our hospitals. Excepting for the maximum security hospital at Atascadero, there are few if any wards remaining in our other hospitals which can be considered as secure, if the philosophy of danger is retained. Our patients have a great deal of freedom, many privileges, and as they improve the freedom and privileges increase until the patient is released to the community. Be it remembered that even at the maximum security hospital they have an active and meaningful and productive treatment program and many of their patients are released with an ever-decreasing rate of return. In the state hospitals for the treatment of the

mentally ill in California, with the exception of the maximum security hospital, there are no longer heavily barred windows and greater than household secure door locks, and many of the doors are not locked at all. Restraint is notably on the decline in our hospitals.

During this development of the treatment program there have been ever-increasing wards developed in our private general hospitals for the care and treatment of psychiatric cases.

Therefore, in summary, I would say that in our California state hospitals for the mentally ill during the past twenty to twenty-five years there has been an ever-increasing treatment program. There has been a continuing and very excellent research and training program involving our neuropsychiatric institutes and clinics and our hospitals as well as the extramural aspects which have been developed over the past twenty-three or twenty-four years. Our facilities are no longer constructed with the idea of custody and security, but have been designed for the carrying out of an active treatment program.

Therefore, in conclusion, I would state as my professional opinion, backed by over forty years in state, private, federal and military experience, that we must now conclude that we should no longer be considered as custodial institutions, but rather as treatment, training, educational, and research activities. While it is dangerous to attempt to look into the future, nevertheless I prophesy that if our present programs and trends are permitted to expand and develop in the unrestricted and scientific manner prevalent in the past several decades, that we can look forward to the time when the incidence of mental illness will be reduced and the periods of hospitalizations necessary for the treatment of those cases which do arise will be considerably shortened.

Finally, in the hope that this improvement will be allowed to continue, and in the belief that there will be an ever-increasing number of people financially able to pay for [fol. 145] the treatment and who are willing and anxious to receive such treatment, I believe those people who are

able to pay without hardship should be allowed the privilege of contributing to the cost of the care they receive.

/s/ Walter Rapaport

Walter Rapaport, M. D.
Superintendent & Medical Director

WR:k

[fol. 146]

Appendix C to Respondent's Petition for Rehearing

States Having Statutes Similar to California Welfare and Institutions Code Section 6650

State:	*Citation to Statute*
Alabama	Code of Ala., Tit. 45, § 257 (1958)
Alaska	Alaska Stat. § 47.30, 270 (1962)
Arkansas	Ark. Stats. (1947) 59-230
Colorado	Colo. Rev. Stats. (1953) Art. 1, Chap. 71, § 15
Connecticut	Conn. Gen. Stats. (1945) Chap. 119, § 2663
Delaware	Del. Code Chap. 51, Tit. 16, §5127
Idaho	Idaho Code, § 66-354
Illinois	Ill. Ann. Stat. Chap. 91½, §9-19
Indiana	Ann. Ind. Stat. Tit. 22, § 401(a)
Iowa	Iowa Code Ann. § 230.15 (1946)
Kansas	Kan. Gen. Stat. (1957 Supp.) Chap. 59, § 2006
Kentucky	K.R.S. (1955) 203.080
Louisiana	La. Rev. Stat. § 143 et seq. (1952)
Maine	Rev. Stats. Man., Chap. 27, § 135 (1954)
Maryland	Md. Code Ann. (1957) Art. 59, § 5
Massachusetts	Ann. Laws Mass. (1957) Chap. 123, § 96
Michigan	Mich. Stats. Ann. (1956) Chap. 127, Art. 14.816
Minnesota	Minn. Stats. (1953) § 526.01
Mississippi	Miss. Code (1942) § 6909-13
[fol. 147]	
Montana	Rev. Code Mont. (1957 Supp.) Tit. 38, § 214

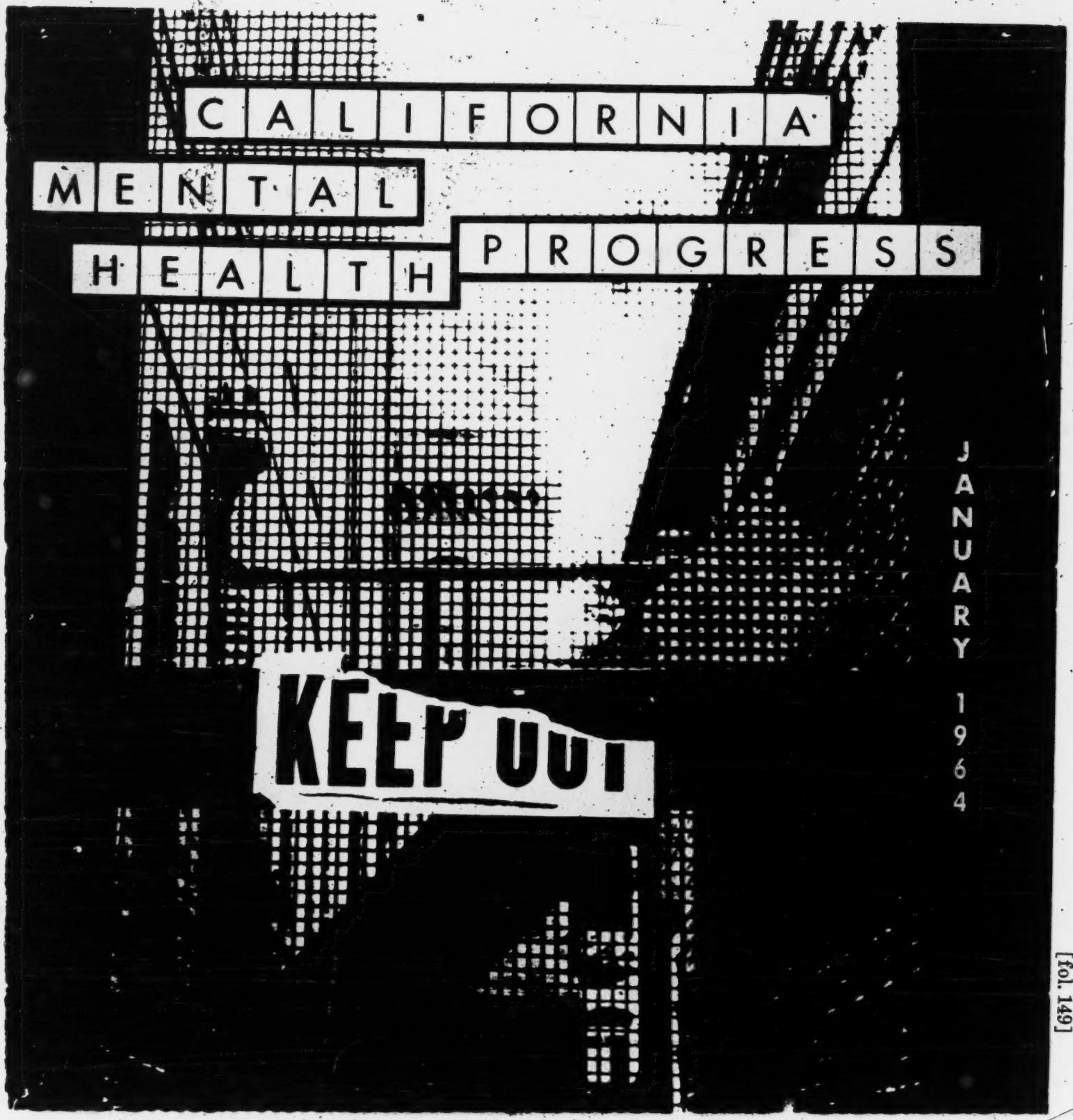
State:	*Citation to Statute*
Nebraska	Neb. Rev. Stats. (1943) § 83-352
Nevada	Nev. Rev. Stats. 433.370
New Hampshire	N.H. Rev. Stats. Ann. (1955) § 8.41
New Jersey	Rev. Stats. N.J. (1937) 30:4-66
New York	Consolidated Laws N. Y. Mental Hygiene Law, § 24, subd. 2
North Carolina	Gen. Stats. N.C. § 143-121 (1958)
North Dakota	N.D. Century Code § 25-09-04 (1963)
Ohio	Ohio Rev. Code (1957 Supp.) Tit. 51, § 5121.06
Oregon	Ore. Rev. Stats. (1955 Supp.) §428.101
Pennsylvania	Penn. Stats. Ann. Tit. 50, § 1361
Rhode Island	Gen. Laws R.I. (1956) § 26-3-17
South Carolina	Code of Laws, S.C., § 32-1028 (1962)
South Dakota	S.D.C. § 30.01A06 (1960)
Tennessee	Tenn. Code § 33-629
Texas	Tex. Ann. Stat., Art. 3196A (1952)
Utah	Utah Code Ann. § 64-7-6 (1953)
Vermont	Vt. Stats. (1947 Rev.) Chap. 281-6679
Virginia	Code of Va. (1956) § 37-125.1
Washington	Rev. Code of Wash., § 71.02.230
West Virginia	Code W. Va. § 2672
Wisconsin	Wis. Stats. Ann. § 52.01 (1953)
Wyoming	Wyo. Stats. § 25-81 (1963)

[fol. 148]

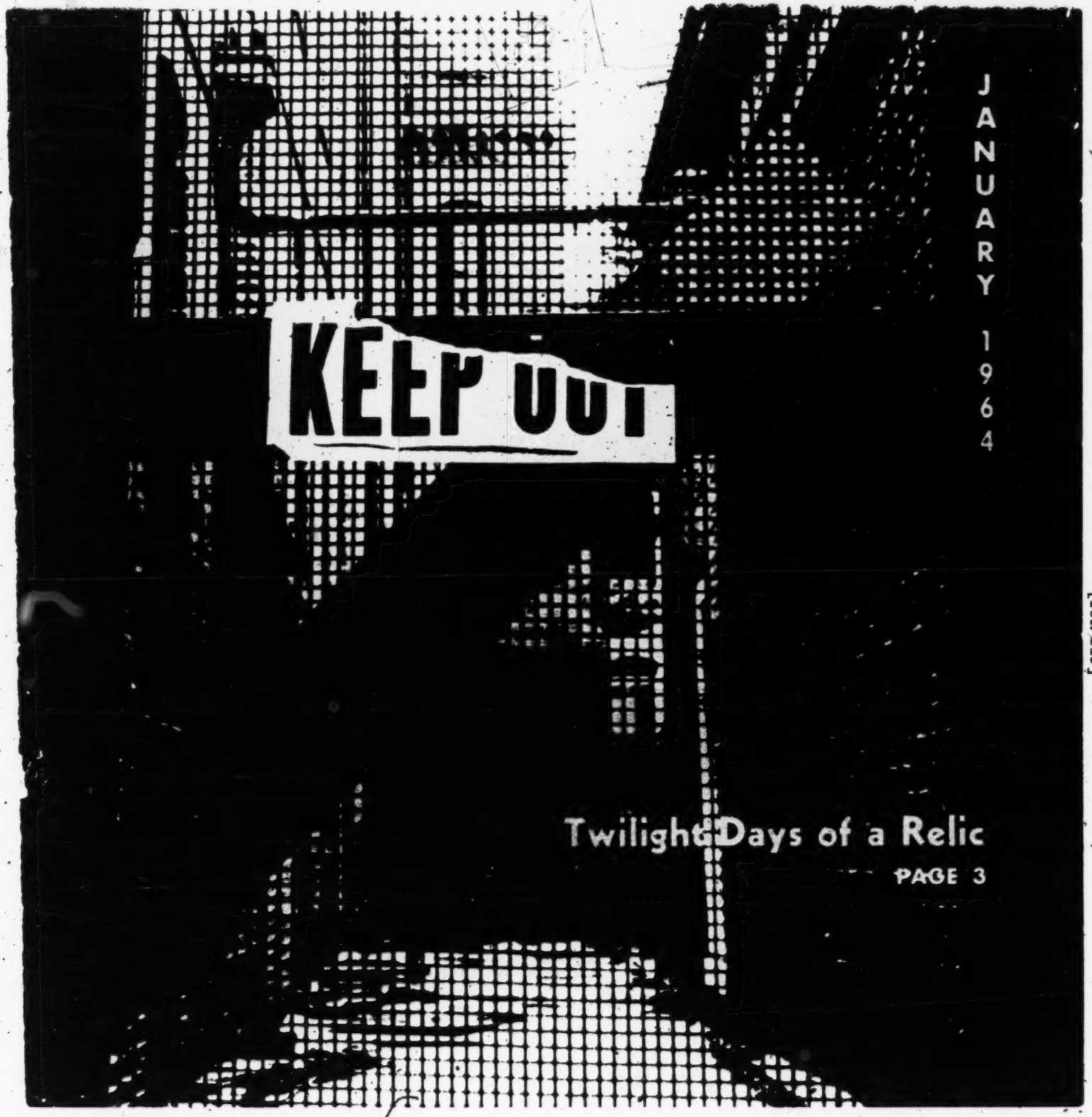
APPENDIX D TO RESPONDENT'S PETITION FOR REHEARING

PHOTOGRAPHS OF AND DESCRIPTIVE MATERIAL RELATING TO STOCKTON STATE HOSPITAL

(See Opposite) ☞



[fol. 149]



[fol. 149]

Doomed for demolition, vacant building at Stockton State Hospital symbolizes a less-enlightened era in treatment of mental disorders.

The Pride of Its Day

SEE NEXT PAGE

[fol. 151]

STOCKTON STATE Hospital's ancient men's building, often compared architecturally with a bastille or prison, is scheduled for demolition, probably in 1964. The building no longer housed patients after 1958; until 1962, it was used for administrative offices.

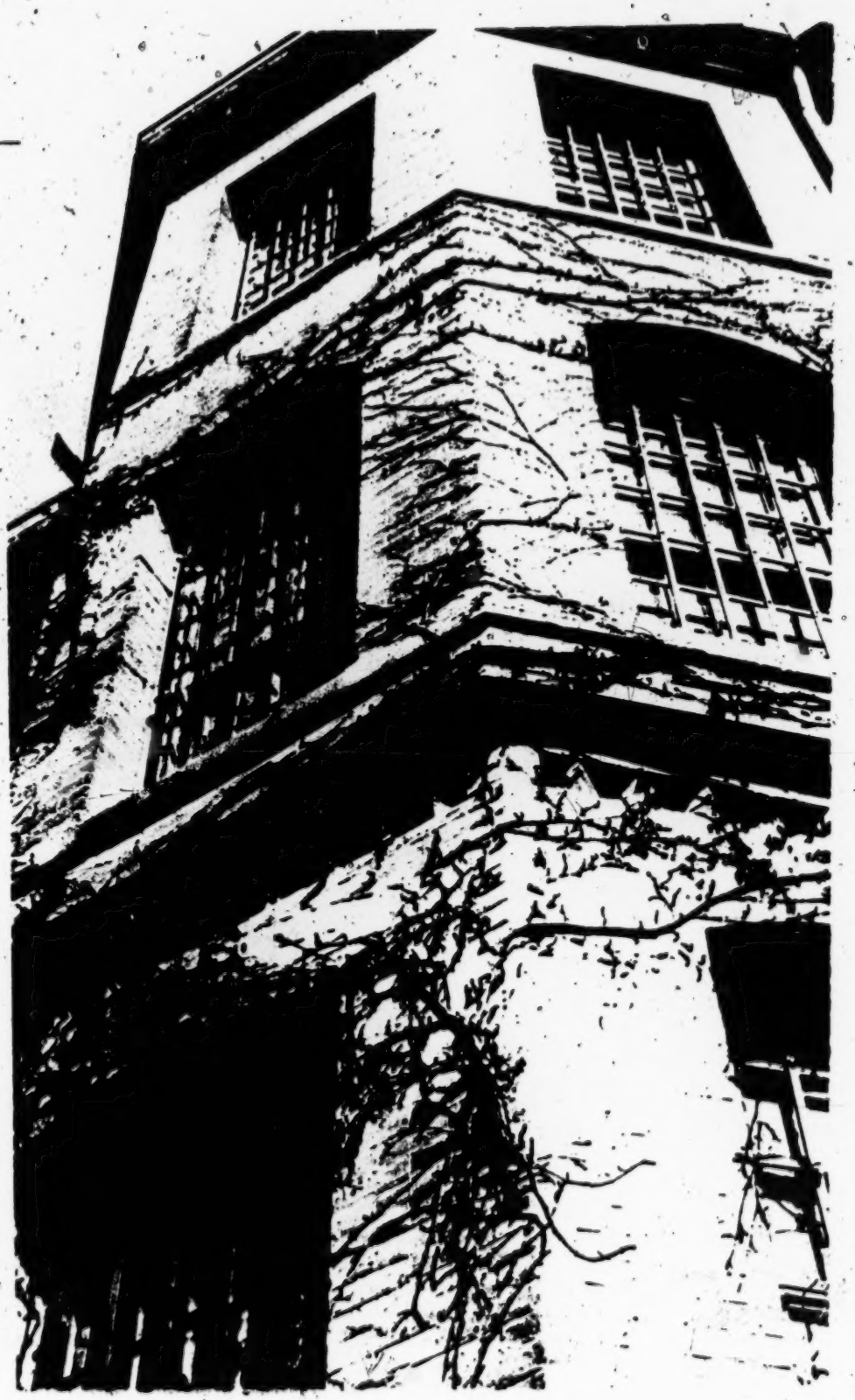
This vacant structure with barred windows, towers, and somber interiors has a somewhat macabre atmosphere, in the opinion of many contemporary observers. However, it apparently owes this atmosphere at least partly to the contrast it presents to the light, airy, and imaginative structures created by many modern architects. To people of its early times, the men's building evidently was close to the last word in mental hospital design.

A report made not long after completion of the building in 1885 declares:

"While it is unpretentious in design and free from superfluous ornamentation, there is nothing prisonlike in its appearance. On the contrary, it is cheerful looking, its outlines strikingly graceful. It may be doubted whether there is any state building, outside of the Capitol, that exceeds it in beauty and symmetry or which in general leaves a more pleasing impression on the beholder.

"In internal arrangement it presents a successful embodiment of the most approved features of asylum construction . . . If the diseased mind responds to its environment, and we know such to be the case, the change from the low dismal, forbidding premises the patients formerly inhabited,

COVER: Padlocked doors guard entrances to Stockton State Hospital's ancient men's building, now vacant and slated for razing.



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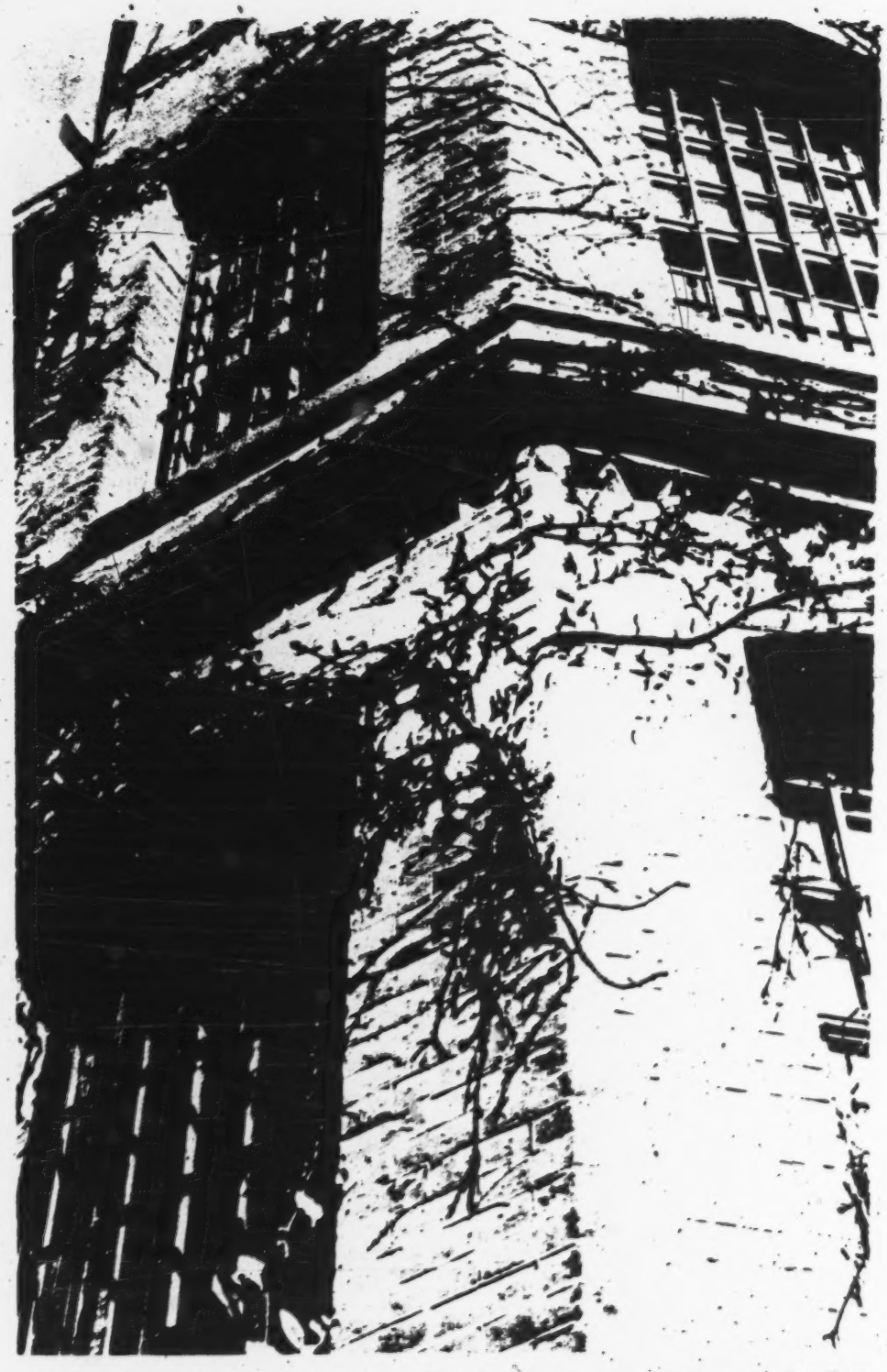
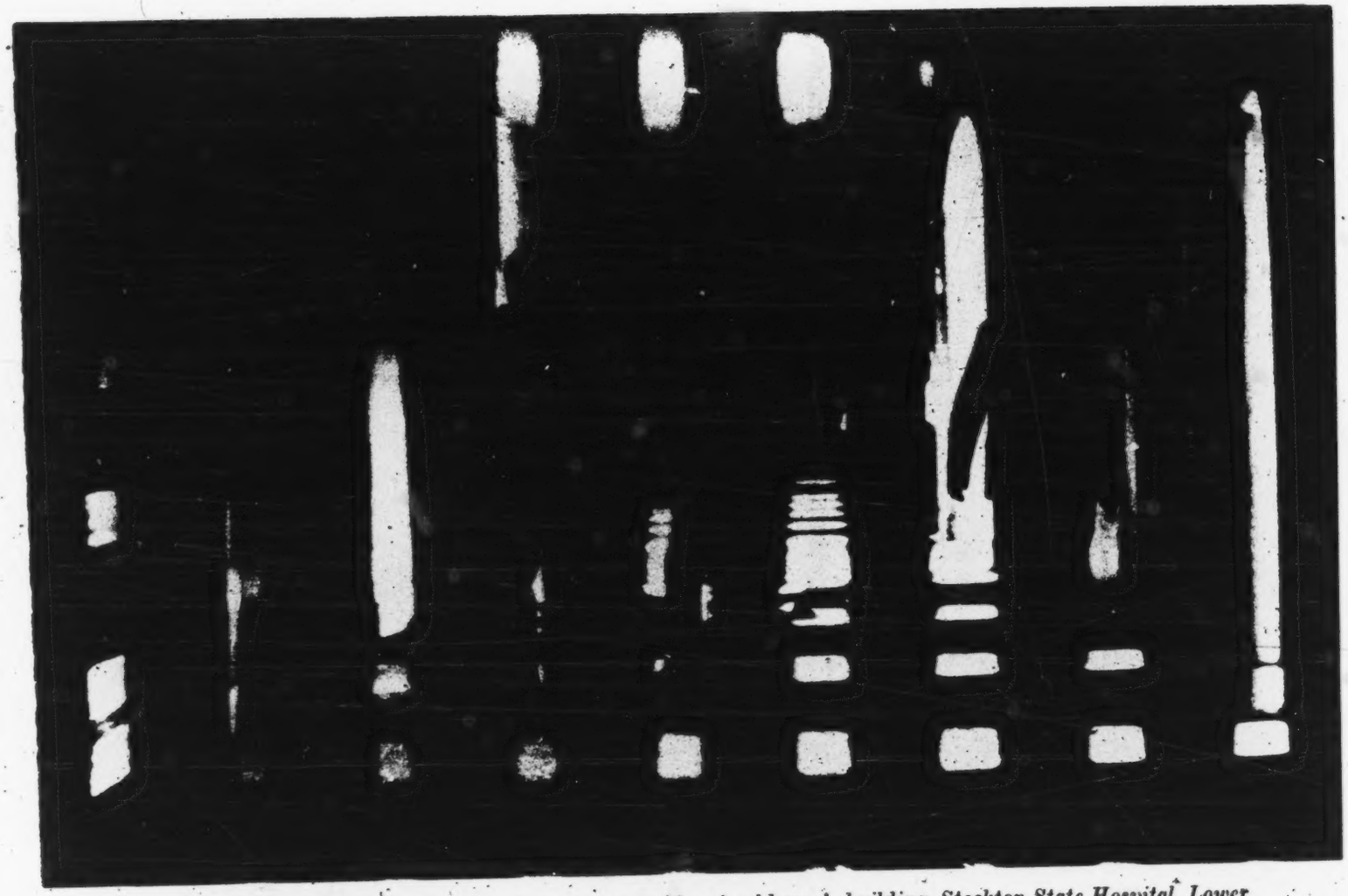
"In internal arrangement it presents a successful embodiment of the most approved features of asylum construction . . . If the diseased mind responds to its environment, and we know such to be the case, the change from the low dismal, forbidding premises the patients formerly inhabited, to these spacious, well-appointed rooms and dormitories, has in itself been a curative agent to an extent impossible to realize . . ."

All of which goes to show that in architecture, as in other fields, many things are relative.

COVER: Padlocked doors guard entrances to Stockton State Hospital's ancient men's building, now vacant and slated for razing.

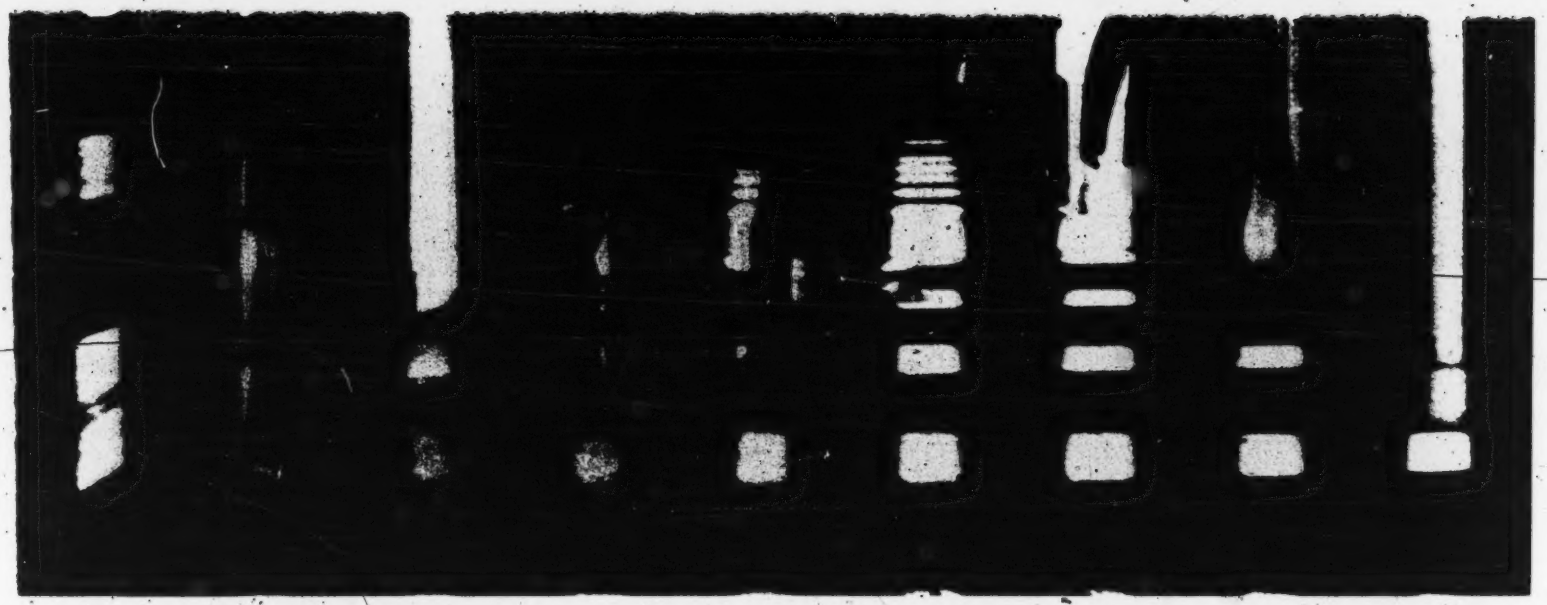


Climbing ivy fails to soften prisonlike effect of barred windows on Stockton State Hospital's old, unused men's building, scheduled for early demolition.



Above, mental hygiene department officials explore dusty corridors in old men's building, Stockton State Hospital. Lower left, view through heavily screened window reveals, lower right, old recreation yard now invaded by dense vegetation.

Fol. 1531



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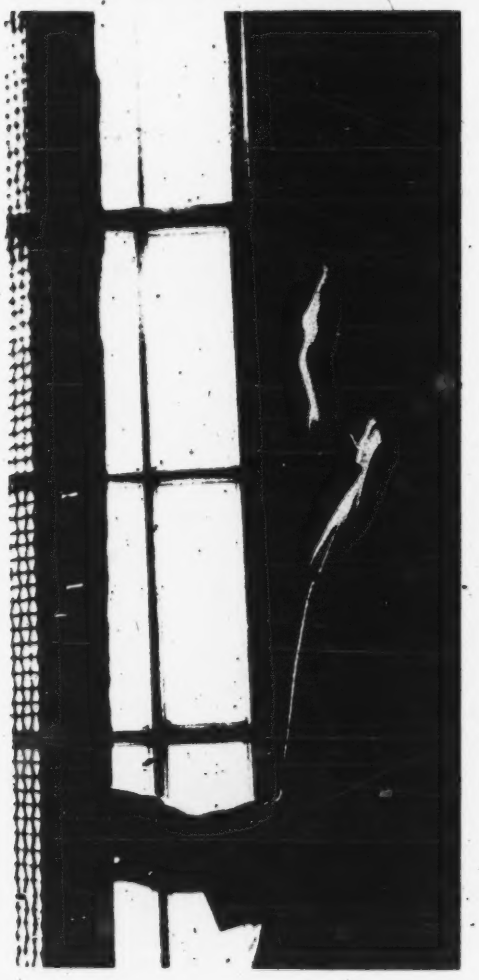

[fol. 153]

[fol. 155]

APPENDIX E TO RESPONDENT'S PETITION FOR REHEARING

[fol. 156] AFFIDAVIT

I, Paul Downard, Chief of the Bureau of Patients' Accounts of the Department of Mental Hygiene of the State of California hereby certify:

That I am the legal keeper of the record of collections of accounts for care, support and maintenance rendered patients in hospitals under the jurisdiction of the California Department of Mental Hygiene.

Based on these records, I estimate a 12 month's revenue from the sources listed below to be $5,526,824—

Collections from parents for adult children	$1,080,054
Collections from children for parents	893,586
Collections from spouse	1,509,272
Insurance collections (for spouse & minor children)	2,043,912
Total	$5,526,824

In addition, there are now on the ledgers secured accounts amounting to $818,165 and detailed as follows:

Secured accounts (from parents & children)	$ 452,157
Secured accounts (from spouse)	366,008
Total	$ 818,165
Grand Total	$6,344,989

/s/ PAUL DOWNARD
Paul Downard
Chief
Bureau of Patients' Accounts
Department of Mental Hygiene

STATE OF CALIFORNIA)
)
COUNTY OF SACRAMENTO)

Subscribed and sworn to before me this 7th day of February, 1964.

/s/ EULA SAVAGE
Notary Public in and for the County of Sacramento, State of California.

[fol. 157]

APPENDIX F TO RESPONDENT'S PETITION FOR REHEARING

[fol. 158]

State of California — Department of Mental Hygiene

Date: February 5, 1964

MEMORANDUM

To:

Honorable Stanley Mosk
Attorney General
Department of Justice
Library and Courts Building
Sacramento, California

From:

/s/ E. F. GALIONI
E. F. Galioni, M.D.
Deputy Director
Hospital Clinical Services

Subject:

California Supreme Court Decision in the Kirchner Case Effects on the Department of Mental Hygiene Clinical Program

It is our considered opinion that the recent California Supreme Court Decision in the Kirchner case will have an adverse effect upon the clinical program of the Depart-

ment of Mental Hygiene. Its influence upon clinical operations is based upon the premise that:

> The economic advantage gained through the absence of legal financial responsibility will impair the utilization of certain family social and psychological resources in achieving the most appropriate treatment and care for the patient.

The decision will affect primarily the following groups of patients:

1. Persons over 65 years of age who are suffering from diseases of the senium or manifesting beginning signs of senility.
2. Mentally ill persons old enough to have adult children upon whom they are either totally or partially dependent.
3. Adult persons suffering from mental illness or mental retardation who are still dependent upon their parents.

The decision will have an effect upon:

A. *Admissions to state hospitals.*

1. Pressures for admission will be increased. Admissions to state hospitals will be sought by relatives for patients now being cared for adequately at home. Economic reasons will play a more important role in these requests.
2. Admissions will be sought for patients now being cared for in private nursing or medical facilities at rates comparable to those of our state hospitals, again for economic reasons.

[fol. 159]

3. Admissions to directly operated state facilities will be sought both by the county and by relatives for patients now confined in county nursing or medical facilities where the county can expect even less reimbursement by certain relatives than it now has.

4. Admission to a state hospital might become preferable to local treatment programs. The economic advantage to the family might outweigh the accepted principles of sound psychiatric practice. For example, 24-hour hospitalization in a large facility miles from home might be preferred to day treatment in a community psychiatric facility close to the family and more in keeping with the patient's social and psychological needs, purely for economic reasons.

B. *Releases from State Hospitals*

A decrease both in indefinite leaves and discharges of patients affected by the Supreme Court's decision is anticipated.

1. It will be more difficult to return such patients who have received maximum benefit from hospitalization to their family. This difficulty will result primarily from the added economic burden placed upon the family when the patient is released.
2. We have been placing patients in private medical facilities at the expense of responsible relatives when these private facilities can offer equal or more appropriate nursing and/or medical care than the state hospital at a comparable cost. This method of release will become highly improbable because of the increased economic burden upon the family.
3. We have been returning patients to county medical and/or nursing facilities when county medical care is more appropriate for the patient. In some instances it has been possible for the county to obtain reimbursement for their cost of care by the family. This procedure will be greatly impaired if the county's reimbursement is decreased further.
4. It will be necessary to rely upon categorical aid programs such as AND and MAA than family resources for release of patients from our hospitals.

C. *Readmissions*

Readmissions to our state hospitals will probably be increased. We anticipate that there will be a decreased family tolerance to working out problems with the patient on leave in the home. We anticipate earlier and at times unnecessary return of the patient to the hospital as a result of the combination of this decreased tolerance and the increased economic burden to the family.

[fol. 160] At this time it is not possible to quantify the above effects; however, we anticipate a trend in the direction of increased admissions, increased readmissions and decreased releases because the economic advantages will outweigh the social and psychological responsibility.
EFG:td

[fol. 161]

APPENDIX G TO RESPONDENT'S PETITION FOR REHEARING

Excerpted Material From Gregory, *Psychiatry*, W. B. Saunders Co., London, 1961

[fol. 162]

THE HISTORY OF THE TREATMENT OF PERSONS WITH MENTAL DISORDERS

PRIMITIVE ANIMISM AND ITS CONSEQUENCES. There is a popular misconception that primitive societies have frequently accorded an exalted status to the mentally defective and insane. Not infrequently the mentally deranged have been treated well in primitive societies, but Linton has pointed out that they are usually regarded with fear and considerable awe, and that they are never liked, admired or given high social status. The treatment accorded to affected individuals may be related to primitive beliefs in some animating principle (such as the psyche or soul) that possesses and controls the body. Sometimes it has been thought that the mentally deranged were possessed by a god, sometimes that they were possessed by a devil or a witch, and sometimes that their souls had left their bodies and were wandering elsewhere. The belief in pos-

session by a devil or witch may lead to violent attempts at exorcism or driving out the evil spirit, while the [fol. 163] "missing-soul hypothesis" provides an excellent sanction for euthanasia (killing the person so that his body may rejoin the wandering soul).

Ancient Greek poetry and mythology record episodes of frenzy affecting the heroes, and early Egyptian papyri contain some references to mental disturbances. More specific accounts of mental disorder are contained in the Books of the Old Testament, Saul, David and Nebuchadnezzar being cited as examples. Epileptic convulsions were long recognized and known as the "sacred disease," but Hippocrates remarked that epilepsy appeared to him in no way more divine nor sacred than other diseases, but that it had a natural cause. "If you cut open the head," he remarked, "you will find the brain humid, full of sweat and smelling badly. And in this way you may see that it is not a god which injures the body, but disease."

In Sparta, under the laws of Lycurgus, those that were born mentally defective probably shared the fate of other weakly infants who were allowed to perish from exposure or were thrown into the river Eurotas. There were also ancient Roman laws providing for the killing of malformed or weakly children, although defectives were tolerated in Rome if they had value for amusement or diversion. An early reference to the care of the insane is contained in Plato's *Republic*, to the effect that they should not be seen openly in the city, but that their relatives should be responsible for watching over them at home as well as they could. The advent of Christian humanitarianism tended to improve the status of the mentally disordered in Europe, but superstitious beliefs in witchcraft and demoniacal possession remained. Treatments included dungeons, chains, starvation, flogging and various primitive forms of shock treatment (such as sudden immersion or lowering the patient into a pit full of snakes), venesection, innumerable drugs, hot baths, prayers, incantations and various attempts to amuse or interest the patient.

Early in the fourteenth century (in the reign of Edward II) legislation appeared in England providing for the

management of an idiot or "born fool" (*fatuus naturalis*) and of his estate. A defective was at that time distinguished from an insane person, whose mental capacity could fluctuate (*non compos mentis sicut quidam sunt per lucida intervalla*), and it was provided that the property of lunatics should be vested in the Crown. The first place in [fol. 164] Britain to care for the insane was the priory of St. Mary of Bethlehem in London where six lunatics were confined in the year 1403. It remained a priory until it was granted to the laity by Henry VIII in 1546, and it was not until 1632 that a medical man (Crookes) was appointed governor. It was approximately two hundred years later than this that the first asylum in England to care for defectives was founded at Park House, Highgate.

During the seventeenth century, early settlers in the American colonies believed the "distraught" and "insane" to be possessed by demons, the devil or witches, and regarded them with fear and treated them accordingly. Hollingshead and Redlich (1958) give the following account of the care of the mentally ill in the state of Connecticut at the time. "Often they created civil disturbances and were driven from their homes and towns or jailed along with beggars and criminals. The family of any person mentally ill was legally responsible for his care. Where a family was able to keep a deranged member at home, the sick person was locked and often chained in a barred room. When the family would not or could not care for its 'insane' member, he was placed under the control of the King's peace officers. When the King's officers were forced to intervene, the individual was taken to jail. If witchcraft was suspected, torture and occasionally hanging followed."

During the eighteenth century, it became generally recognized that "idiots" and "distraught persons" were different from ordinary delinquents. Those without family, friends or money became a charge upon the community of birth or residence, which tried to avoid such responsibility in two ways—either by abandoning the insane person in another town (usually at night) or by sale of the person at an annual auction to the lowest bidder (who tried to

use him as labor on his farm). During the latter part of the eighteenth century, the indigent insane came to be admitted to the workhouse, which was a combination "poorhouse" and jail operated by the city and designed to accommodate a variety of persons such as the following: ". . . rogues, disorderly persons, all runaway stubborn servants and children, nightwalkers, pilferers; all persons who neglect their callings, misspend earnings and do not provide for their families; and all persons under distrac- [fol. 165] tion, unfit to be at large and not cared for by their friends or relatives." The overseer of the workhouse was employed to "punish with fetters and shackles and by whipping on the naked body not more than ten strikes at a time, or with close confinement without food or drink," those who did not follow his orders.

Humane Reform and Abolition of Restraint. Modern concepts of the care and treatment of mental illness are usually considered to have arisen in France and are associated with the names Pinel and Esquirol. In 1792, Pinel, a physician at the Bicêtre Hospital, was given a free hand by the Revolutionary Commune, and immediately liberated more than fifty patients, some of whom had been in chains for thirty years. He believed that the latter had been unmanageable only because of the treatment they had received, and this view was borne out by the results of his action. Esquirol succeeded Pinel at the Salpêtrière in 1810 and made further extensive reforms in the housing and management of the mentally ill throughout France.

In America, the Quakers of Philadelphia set aside special cells for housing the mentally ill in the cellar of the Pennsylvania Hospital which was opened in 1756. Twenty years later the Virginia legislature became the first in this country to vote public funds to help in building a hospital devoted exclusively to the insane. The second hospital in America built especially for the mentally ill was the Friends Asylum at Frankfort, Pennsylvania, which was opened in 1817 by the Philadelphia Society of Friends. Other mental hospitals were built, and in 1841 the Pennsylvania Hospital became the first general hospital in this country to erect a wing for the care of the mentally ill.

However, during the first half of the nineteenth century, many people continued to associate insanity with pauperism, and the mentally ill frequently continued to be confined in poorhouses under unfortunate conditions.

Reforms in the care of the mentally ill in America are often associated with the names of Benjamin Rush (1745-1813) and Thomas Kirkbride (1809-1883). Another important motive force behind many reforms in both America and Europe was a retired school teacher from Boston, Dorothea Lynde Dix (1802-1887). She became "shocked" by what she had seen of the neglect and maltreatment of mental patients, and succeeded in stimulating governmental [fol. 166] agencies in the United States and elsewhere to provide new and improved facilities for the care of the mentally ill. She has been credited with having been directly responsible for creating or extending the facilities of a total of thirty-two hospitals.

Mental Hospital and Community Psychiatry. In addition to improved accommodations and custodial care for the insane, the second half of the nineteenth century saw greatly improved medical interest in the investigation of mental disorders. Various physicians described isolated psychiatric syndromes, and these were systematized and classified by Emil Kraepelin (1856-1926). Kraepelin and many of his contemporaries believed that all mental disorders resulted from organic brain diseases (frequently hereditary in origin), and the search for brain lesions by men as Wernicke and Alzheimer resulted in the differentiation between organic metal disorders (having observable brain lesions) and "functional" mental disorders (in which no such abnormality of the brain could be discovered).

The end of the nineteenth century also saw the publication of Sigmund Freud's studies on hysteria, the development of the method of investigation which he termed psychoanalysis, and the application of this method to the retrospective study of the childhood experiences and relationships of adults with neuroses.

The early years of the twentieth century saw attempts at integration of these very different types of information by such men as Eugen Bleuler (1857-1939) of Zurich, Switzerland, and Adolf Meyer (1866-1945) of Johns Hop-

kins University, who developed a system of psychobiology. The essential features were (1) the unity of body and mind, (2) the necessary combination of psychological and biological aspects in all causes of mental illness, and (3) the uniqueness of the individual patient. The latter viewpoint was influential in developing what has come to be known as *dynamic psychiatry,* involving the study of emotional processes, their origins and the mental mechanisms. In contrast, the older nosological or *descriptive psychiatry* is based on the study of readily observable external factors (as formulated by Kraepelin).

As a result of his experiences as a patient in three mental [fol. 167] hospitals (private profit-making, private nonprofit making and a state hospital), Clifford Beers wrote a book in 1908 entitled *A Mind That Found Itself,* designed to impress the public with the need for reform in the care of the mentally ill. The same year he was successful in forming the Connecticut Society for Mental Hygiene, and the following year the National Committee for Mental Hygiene was established, which later became one of the parent bodies of the National Association for Mental Health. The mental hygiene movement was material in helping to establish facilities for early out-patient treatment of adults and children with psychiatric problems. The main method of treatment employed in these facilities was psychotherapy. Concurrently, a variety of empirical somatic methods of treatment were introduced in the mental hospitals (e.g., the malaria treatment of general paresis, insulin coma treatment, brain surgery, Metrazol and later electroconvulsive therapy, and a variety of drugs with sedative or stimulant properties).

The years since World War II have been characterized by a greatly increased acceptance of psychiatry in medical teaching and practice, the establishment of psychiatric units in general hospitals (to which universities largely transferred their affiliation), marked expansion in the numbers of psychiatrists engaged in private practice, and the development of a variety of other community resources for the out-patient treatment of patients with psychiatric disorders.

[fol. 168] [File endorsement omitted]

[fol. 169]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S.F. 21349

[Title omitted]

APPELLANT'S REPLY TO RESPONDENT'S PETITION FOR A REHEARING AND ANSWER TO AMICI CURIAE—Filed February 24, 1964

City and County of San Francisco

Honorable Byron Arnold, Judge

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Appellant replies to the petition of respondent and the briefs of Jack M. Merelman, Legal Counsel, County Supervisors Association of California, Spencer M. Williams, County Counsel, County of Santa Clara, and California Association of Nursing Homes, Sanitariums, Rest Homes, [fol. 170] and Homes for the Aged, Inc. as follows:

I. The Holding of This Court Appertains Only to Persons Who Have Been Committed and Are Incarcerated.

One thing that petitioner and Amici Curiae have in common is that they fail to understand that this Court in the case of *Department of Mental Hygiene* v. *Hawley* (1963) 59 Cal.2d 247 and in its decision herein was talking about patients of the state hospitals who were *committed* thereto. These patients are in fact incarcerated, and they must obtain a discharge from the medical superintendent before they can be released. (Welf.C. 6728-6735.) These are people who were committed and incarcerated for the benefit of themselves and the public. As stated at 27 Ops. Cal. Atty. Gen. 376, 377:

"It is a fundamental concept derived from the common law that the insane (section 5041) defines 'insane' to mean 'mentally ill') are considered wards of the State which has a duty to protect them and their property as well as to protect the public from their unreasoned acts." (Citing cases.)

Respondent and the other moving parties argue that the Court's decision would make state hospitals free institutions, and that the facilities of the state for the insane would be used as a dumping ground for all of the mentally ill including the harmless senile. But this is not what counsel for respondent previously said. At 34 Ops. Cal. Atty. Gen. 313, 315 it is stated as follows:

[fol. 171] "It is our opinion that nonpsychotic seniles as defined *supra* are within the scope of section 5040 and are 'mentally ill persons.' With the exception that the nonpsychotic senile may not be committed to a state mental hospital (sections 5102 and 6733 specifically prohibit the admission and require the discharge of those affected with harmless, chronic, mental illness) the other commitment provisions of chapter 1, part 1, division 6, are applicable. These include commitment to licensed sanitariums, hospitals other than a state mental hospital, or other suitable facility (section 5100(a)), or to a counselor in mental health (section 5076)."

Moreover, the superintendent of a state hospital can discharge any committed patient who is still ill but whose discharge is not considered detrimental to the public welfare or injurious to the patient. Welf.C. 6730 reads as follows:

"The superintendent of a state hospital, on filing his written certificate with the Director of Mental Hygiene, may discharge as improved, or may discharge as unimproved, as the case may be, any patient who is not recovered, but whose discharge, in the judgment of the superintendent, will not be detrimental to the public welfare, or injurious to the patient."

Presumably the committed person in the case before this Court did not fall into the category mentioned in Welf.C. 6730, because though she had Eleven Thousand Dollars ($11,000.00) in her guardianship estate, the superintendent did not see fit that she be released. Had the incompetent, [fol. 172] fallen into the category mentioned in Welf.C. 6730 her guardian could have placed her in one of the facilities of California Association of Nursing Homes, Sanitariums, Rest Homes, and Homes for the Aged, Inc. or any place else that her guardian could select with the approval of the Court.

The placement of wards by guardians is covered in Prob.C. 1500 which states in part as follows:

"• • • . The guardian of the person of a ward may fix the residence of the ward at any place in the state, but not elsewhere without the permission of the court."

This subject is also covered at 34 Ops. Cal. Atty. Gen. 312, 316 where it is stated:

"The guardian's power to choose the residence of the ward including a sanitarium or rest home is restricted to the extent that the guardian's actions must be for the best interests of the ward and are subject to review by the court which has jurisdiction over the guardianship. There are also statutory limitations on the guardian's freedom to make a placement of his ward. These relate to the type of placement desired as discussed below. We find no provision in the Welfare and Institutions Code permitting the guardian alone, or with the approval of the Probate Court, *to place the ward in a state hospital.*" (Italics ours.)

[fol. 173]

II. Hawley Is Dispositive of the Case Before the Court.

Department of Mental Hygiene v. *Hawley* (1963) 59 Cal.2d 247, is dispositive of the issues of this case before the Court. In *Hawley* the incompetent was committed under P.C. 1638. Welf.C. 6650 reads in part as follows:

"• • • . The liability of such persons and estates shall be a joint and several liability, and such liability shall

> exist whether the mentally ill person or inebriate has become an inmate of a state institution pursuant to the provisions of this code or pursuant to the provisions of Sections 1026, *1368*, 1369, 1370, and 1372 of the Penal Code." (Italics ours.)

In other words the liability imposed in the *Hawley* case was of the same source as the liability imposed in the case before the Court.

Respondent cites *Kough* v. *Hoehler* (1956) 413 Ill. 409, 103 N.E.2d 177, for the proposition that the two types of commitments should be handled differently. It is true that they are handled differently in the State of Illinois, because in Illinois the act under question in the *Kough* case "excludes from its provisions mentally ill persons who are in custody on a criminal charge." However, in this state the Legislature has declared in Welf.C. 6650 that both types of commitments should be charged and the liability imposed in the same manner. When this Court declared that this state could not constitutionally charge *Hawley* for his son's commitment under Penal Code 1368, the Court in [fol. 174] effect declared that no relative of any mentally ill person committed and incarcerated in a state institution under the Welfare and Institutions Code or the Penal Code could be held liable under Welf.C. 6650.

III. Welfare and Institutions Code 6650 Does Not Meet the Fairness Required by the Constitution of the United States or This State.

At page 8 of the brief of Jack M. Merelman, the County Supervisors Association of California contends that Welf.C. 6650 is a fair law "from our American ideal of fairness," and respondent evidences this fairness by proclaiming at page 31 of its brief as follows:

> "* * *. However, section 6650 expressly imposes a *joint and several* obligation and the law is very clear that there is a right to contribution of one joint and several obligor against another. (Civil Code § 1432.)"

Let us examine this supposed right of contribution and respondent's concept of fairness that follows therefrom.

C.C. 1432 reads as follows:

> "A party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him."

Let us set up a hypothetical case where a mother is committed to a state hospital. She has three adult sons all [fol. 175] living in California, and their names are A, B, and C. A is required to support the mother under Welf.C. 6650. B and C are not pursued by the Department because of their poor financial circumstances. Nevertheless, as we read Welfare and Institutions Code are not B and C also liable for the support of the mother, and if that is true, A should be able to sue B and C for their proportionate contribution. Finally, since it is a debt for necessaries of life, B and C would not be entitled to a claim of exemption under C.C.P. 690.26, and A could satisfy his judgment out of the earnings of B and C up to Fifty Percent (50%) thereof in spite of their poor financial circumstances.

Now, if the mother is discharged before A decided to proceed, he could sue the mother as well for her share, but the Department is quick to point out in footnote 24 at page 31 of their petition as follows:

> "Of course, reading sections 6650 and 6655 together, one would have to conclude that the right of the joint and several obligors to obtain contributions from the patient would be tempered by the admonition of section 6655 that the patient must not be stripped of all his assets so as to leave him a burden upon society. The contributing relatives would have no greater right to impoverish the patient than would the Department of Mental Hygiene."

But no relief is provided for B and C.

Finally, what would be the result in a case where the mother had an estate of her own, and the Department

[fol. 176] decided to charge it and not charge either A, B, or C. Would the mother have a cause of action against A, B, and C upon her release for their proportionate share of the joint and several obligation created by Welf.C. 6650? Apparently so.

IV. Payments Made Under a Constitutional Statute Cannot Be Recovered.

At 38 Cal.Jur.2d 305 it is stated:

> "Money paid under a statute that is subsequently declared to be unconstitutional cannot be recovered back as a payment made under a mistake of law, since such a payment is made according to the understanding of the parties as to the law prevailing at the time it was made."

This rule applies to the payment of a tax under an unconstitutional law (*Wingerter* v. *San Francisco* [1901] 134 Cal. 547) and to the payment of an assessment between private parties imposed by the State Superintendent of banks as well. (*Campbell* v. *Rainey* [1932] 127 C.A. 747.)

V. C.C. 206 Does Not Support the Classification in Question.

Spencer M. Williams, County Counsel, County of Santa Clara, argues in his brief at page 8 that C.C. 206 imposes a reciprocal obligation of support between parent and child, but he fails to note that the Legislature has terminated this obligation in several areas of support in the Welfare and Institutions Code.

[fol. 177] Under the section to Aid To The Needy Blind, it is provided at Welf.C. 4011 in part as follows:

> "* * *. Notwithstanding the provisions of Section 206 of the Civil Code, or Section 270c of the Penal Code, or any other provision of this code no demand shall be made upon any relative to support or contribute toward the support of any applicant for or recipient of aid under this chapter. No county or officer or employee thereof shall threaten any such relative with

any legal action against him, by or in behalf of the county or with any penalty whatsoever."

Under the section on the Mentally Deficient it is provided at Welf.C. 7011.5, as amended in 1963, in part as follows:

"* * *. This section shall not be construed to impose any liability on the parents of mentally deficient persons."

A similar provision under the section covering Aid To Needy Children is found at Welf.C. 3011, as amended in 1963.

So it is submitted that C.C. 206 can no longer serve as a classification standard as claimed by counsel.

VI. The Only Facts Before the Court Are These Facts Set Forth in the Pleadings.

Respondent took its judgment in this case on its Motion for Judgment on the Pleadings, and for the purposes of this appeal we are limited to the facts as therein set forth. Respondent and Amici Curiae have apparently [fol. 178] joined in a concerted effort to flood the Court with many additional facts and several statements that do not appear to be factual. If respondent were serious in supplying the Court with the factual information included in the affidavits appended to its petition, respondent could have built a proper record in the trial Court below.

Conclusion

Most of the arguments raised by petitioner herein and in the briefs of Amici Curiae are directed to the propositions resolved in the case of *Hawley* and not in the case now before this Court. Their anxieties would be laid to rest would they allow themselves to understand that the decision herein and in *Hawley* has no effect on any of the assistance programs under the Federal government or of this State; that it only applies to people such as the son of *Hawley* and the incompetent in this case who are pre-

sumably detained against their will and the will of their relatives.

It is respectfully submitted that the petition for rehearing be denied.

Dated, Redwood City, California, February 21, 1964.

Respectfully submitted,

Dinkelspiel & Dinkelspiel, By Alan A. Dougherty, Attorneys for Appellant.

[fol. 179] [File endorsement omitted]

Order Due
February 28, 1964

S. F. No. 21349

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DEPARTMENT OF MENTAL HYGIENE

v.

KIRCHNER

ORDER DENYING REHEARING—Filed February 26, 1964

Respondent's petition for rehearing DENIED.

Gibson, Chief Justice.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 180] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 181]

SUPREME COURT OF THE UNITED STATES

No. 111—October Term, 1964

DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA,
Petitioner,

vs.

EVELYN KIRCHNER, Administratrix of the
Estate of Ellinor Green Vance.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.